88-1997

Supreme Court, U.S.
FILED
MAY 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BROOKS GREGORY DAVIS and
MARY FERGUSON DAVIS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Date Completed: May 30, 1989

QUESTIONS PRESENTED

1. Whether the fifth amendment's double jeopardy clause bars retrial where an earlier trial was aborted because of the mid-trial disqualification of trial counsel resulting from the trial court's decision to admit into evidence the alleged extrajudicial statements of counsel as co-conspirator statements or acts, and: (i) the evidence of counsel's participation in the charged conspiracy was sharply disputed by contrary testimony; and (ii) contrary to Fed. R. Evid. 104(a), the trial court refused to determine preliminarily outside the presence of the jury or to develop a record that would permit a finding under a fair preponderance standard that the attorney was a member of the charged conspiracy and the alleged threat furthered the objects of that conspiracy.

2. May a trial court, in derogation of a defendant's double jeopardy protections and right to counsel of choice, disqualify counsel and abort a criminal trial in progress on the basis of an uncorroborated allegation of attorney misconduct where the potential conflict of interest was clearly defined, fully cognizable and completely explained to the defendant and the defendant's unequivocal waiver of any conflict would have permitted the trial to proceed with the lawyer of his choice and the jury he had chosen.

3. Whether the alleged extrajudicial declarations of a third party aimed at impeding a prosecution but made months after indictment and arrest are properly admissible at trial against the alleged members of a conspiracy where there is no evidence and the trial court failed to find that the underlying conspiracy continued beyond the dates alleged in the indictment or that the conspiracy included an ancillary agreement to obstruct justice.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Brooks Gregory Davis ("Brooks Davis") and Mary Ferguson Davis ("Mary Davis"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit issued on January 23, 1989. A timely motion for rehearing with a suggestion for rehearing *en banc* was denied on March 31, 1989.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 867 F.2d 122 and is reprinted as Appendix A (A 1).[1] The opinion of the District Court denying motions to dismiss on double jeopardy grounds is unreported and is reprinted as Appendix B (A 19).

JURISDICTION

The decision and judgment of the Court of Appeals was entered on January 23, 1989. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 31, 1989 (Appendix C at A 52). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND PROCEDURAL RULES INVOLVED

The Constitution of the United States of America provides in pertinent part:

Fifth Amendment

> No person . . . shall be subject for the same offence to be twice put in jeopardy of life and limb.

Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defence.

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[1] References to the appendices will be styled "A ____". References to the appendix prepared for the Second Circuit will be styled "CA ____".

The Federal Rules of Evidence provide in pertinent part:

Rule 104(a)

Questions of Admissibility generally.

> Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Rule 801(d)(2)(E)

Statements which are not hearsay.

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

A. Introduction

This case raises novel and important issues under both the fifth and sixth amendments to the Constitution which warrant review by this Court.

The mistrial as to Brooks Davis and Mary Davis over their vigorous and continued objection was not manifestly necessary, and indeed, was plainly avoidable. The district court should have carefully scrutinized the proffered evidence before ruling it admissible and disqualifying counsel. Before uncorroborated evidence relating to the alleged misconduct of trial counsel, as with any third party statement, can be admitted at trial, the government is required to establish by a fair preponderance of the evidence at a hearing outside the presence of the jury its claim of counsel's misconduct and the defendant's involvement

in that misconduct. Here, the Court of Appeals sanctioned the trial court's refusal to determine preliminarily and outside the presence of the jury crucial factual issues under Fed. R. Evid. 104(a) before deciding to admit the challenged evidence. By ducking these essential preliminary findings, the trial judge abdicated his responsibility under Fed. R. Evid. 104(a) and the proposed evidence should have been excluded; counsel should not have been disqualified and a mistrial could have been avoided.

Even assuming the courts below did not err and that evidence of counsel's role in the alleged obstruction of justice was admissible, substantial fifth and sixth amendment considerations required that the trial judge pay special attention to the defendant's unequivocal request to continue the trial with counsel of his choice before the jury he had selected. The district court's flat refusal to honor the knowing waiver of conflict-free counsel, where there was no conceivable threat to the integrity of the trial or prejudice to the government, unnecessarily obstructed defendant's exercise of his sixth amendment right and threatens, needlessly, to place petitioners in jeopardy before another jury.[2]

B. The Indictment and Aborted Trial

Brooks Davis and his wife, Mary, are named in a superseding indictment charging them and others with violations of the federal narcotics laws. Brooks Davis is also charged with violations of the Travel Act (18 U.S.C. § 1952) and the federal firearms statute (18 U.S.C. § 924(c)); he has been detained without bail since his arrest on October 23, 1987. Except for a brief period of detention, Mary Davis has been free on bail since she was named in a superseding indictment on December 10, 1987.

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[2] Although an order disqualifying counsel in a criminal case normally is reviewable only after conviction, *Flanagan v. United States*, 465 U.S. 259 (1984), an order refusing to dismiss an indictment on double jeopardy grounds is immediately appealable under the collateral order exception to the final judgment rule. *Abney v. United States*, 431 U.S. 651 (1977). And where, as here, manifest necessity for the mistrial is attributable to a disqualification order, the basis for disqualification is properly reviewable on the interlocutory appeal. *United States v. Kwang Fu Peng*, 766 F.2d 82, 86 (2d Cir. 1985).

A trial on a third superseding indictment,[3] naming Brooks and Mary Davis and two co-defendants, Claddis Arrington and Wayne Davis (no relation to Brooks or Mary Davis) and charging them with participating in a narcotics conspiracy until October 21, 1987, commenced on April 13, 1988. (CA37-44). On April 22nd, following the testimony of two of its principal witnesses against Brooks Davis, the government wrote the trial judge to alert him to evidence of witness-tampering allegedly involving Robert M. Simels, Esq., trial counsel for Brooks Davis.[4] (CA540). In substance, the government claimed that Simels had visited a government witness, Aaron Harper, at the Metropolitan Correctional Center ("MCC") in New York City, and in a fifteen minute interview, had threatened Harper in order to obtain an affidavit recanting earlier statements Harper had made to the government. The government informed the trial court that in his earlier statements Harper had accused defendant Claddis Arrington of complicity in the shooting of a government witness, Isaac Diggins, and had accused Wayne Davis of asking for Harper's help in killing other government witnesses. The government's letter did not refer to Mary Davis or connect her in any way to the events at MCC.

The government argued that this allegation raised a serious question of whether Simels was now a sworn or unsworn witness and whether he ethically could continue as Brooks Davis' trial counsel. Rather than moving for a mistrial, the government urged that these potential problems could be cured if the trial judge secured necessary waivers after conducting the allocution

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[3] The third superseding indictment, which was the subject of the aborted trial, alleged the defendants' participation in a narcotics conspiracy "until October 21, 1987." (CA37). Following the mistrial, the grand jury returned a fourth superseding indictment adding charges against Brooks Davis, Wayne Davis and Claddis Arrington for conspiring to obstruct justice and obstruction of justice and extending the termination date of the narcotics conspiracy to the date of the Indictment – May 26, 1988. Mary Davis is not named in the obstruction charges. (CA45, 53-55).

[4] Mary Davis was represented by separate counsel in pretrial proceedings and throughout the trial.

and administering the admonitions required by *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982). (CA540, 547-48). In a letter, also dated April 22nd, Simels flatly denied the government's charges and requested a full hearing on the matter. (CA550).

At conferences early the following week as the trial proceeded, the government announced that it would call Harper to testify in its direct case against all the defendants to an alleged plot to murder Isaac Diggins, a government witness, and to his meeting with Simels, including testimony about the alleged threat, even if introducing the evidence resulted in Simels' disqualification and required a mistrial. (CA63-64). The government made it clear, however, that it did not intend to move for a mistrial (CA66), claiming that waivers and redactions were adequate curative measures. (CA62, 125). For their part, the Davises renewed their request for a hearing (CA69, 89, 97), made it plain that they wanted to continue with the jury they had chosen and had no intention of calling Simels as a witness or requesting a mistrial. (CA125). The government conceded that it had no evidence connecting Mary Davis to the events Harper would describe in his testimony (CA92), but argued that the evidence of the claimed obstruction was admissible against all the defendants as statements or acts of co-conspirators in furtherance of the underlying narcotics conspiracy or as evidence of each defendant's consciousness of guilt on the narcotics charges.

In a letter to the trial court on April 26th, Simels again denied any wrongdoing and set forth, in detail, his version of his meeting with Harper. (CA560). After conferences on April 25th and 26th, the trial judge, over the government's objection, ordered Harper produced for a "live" proffer. The limited purpose of Harper's testimony, as the judge repeatedly explained it, was simply to determine whether it was consistent with the government's earlier proffers (CA129-30): "My only purpose is to determine whether the witness will testify before the jury in accordance with the government's letter. The ultimate question about the credibility of the witness and, indeed, the ultimate question of

how all this came about, that is going to be for the jury, provided the witness will testify."[5] (CA107-08). Indeed, the court initially contemplated proceeding *in camera* in the presence of government counsel only, without the defendants or their lawyers (CA101, 128), but ultimately opened the proceedings to the defense. (*Id.*).

On April 27th, Aaron Harper testified outside the presence of the jury that he saw Brooks Davis on April 11th in a holding pen at MCC and that he mentioned to Davis that he was to be a witness in Davis' case. (CA136). Later that day, Harper was returned to the pen where he saw Brooks Davis, Wayne Davis and Claddis Arrington. (CA137). Harper told them that the government had questioned him about Brooks and Mary Davis and, "I told them I didn't know nothing about it." (CA138). According to Harper, Brooks Davis said he would be sending his lawyer to see Harper with a piece of paper saying "I ain't going to testify against him." (CA158).

Harper continued that the following morning he met with Simels in a small room at MCC (CA139) for about fifteen minutes. Harper told Simels that DEA had questioned him about Brooks and Mary Davis and "I told them I don't know nothing about Brooks." (CA140). Harper also told Simels that he had been arrested and had signed a confession. According to Harper, Simels told him he could fight the confession (*id.*) and that he should not trust his lawyer because he was working with DEA. (CA142). Harper also testified that Simels said to him, "Don't let the DEA, you know, have you testify against your friends that you once knew outside on the street while your family is out there." (CA141). Harper did not say at what point in the conversation Simels made this remark. Simels allegedly also told him that his assistant would come back with a piece of paper to sign saying "I ain't going to testify against Brooks and Wayne and Arrington." (CA141a). An hour or so later, according to

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[5] In its oral opinion granting the mistrial on May 2, 1988 the trial court confirmed the "hearing" was for this limited purpose only. (CA617).

Harper, another lawyer came and said he had a paper from Simels for Harper to sign. (CA143). Harper testified that he really did not read the paper, but only glanced at it before signing it where he was told. (CA144). Under questioning by the court, Harper testified that he had told the government the truth about the Diggins shooting. (CA149-50).

The trial court refused to allow defense counsel to cross-examine Harper or otherwise to test his credibility. Defense counsel was not permitted to ask him about the alleged threat, the suspect affidavit (CA153-54, 156-57), his prior statements to the government (CA152), or whether he had made the statements attributed to him in the affidavit when he met with Simels. (CA162). When Simels began to question Harper and asked him if he had told him during the interview that Harper had lied when he was questioned by the government (CA153), the trial court would not permit cross-examination, and immediately cut off further questioning by the defense and suggested that Simels testify instead. (CA158).

Even brief questioning by the court pointed to huge gaps in Harper's testimony: He testified that he had not been threatened by Brooks Davis, Wayne Davis or Arrington when they spoke to him at MCC on April 11th. (CA158). He also admitted telling Simels a number of the things which are attributed to him in the affidavit. (CA160, 538). Harper testified that he did not recall telling Simels about any alleged plot by any of the defendants to murder Diggins. (CA160-61). Significantly, Harper did not characterize any of Simels' comments as threats, did not testify that he felt threatened or that the information in the affidavit he signed was the result of pressure by Simels or anyone else. Indeed, while Harper now claimed his statements to the government on April 10th were true, he never denied making the statements attributed to him in the affidavit, except to claim that he had not told Simels that the government had threatened him with a loss of property (CA161-62), and denied having said

that the government had refused his request for an attorney, only that one was not present. (*Id.*).[6]

Robert Simels, Esq., took the stand and categorically denied having threatened Harper when he met him on April 12th at MCC. (CA170). Simels testified that he and co-counsel, Ronald Rubenstein, had received a telephone call at Simels' office from Brooks Davis on April 11th (CA163), informing him that a prospective witness, Aaron Harper, was at MCC and asking if Simels could speak with him. (*Id.*). Simels testified that he made arrangements to meet Rubenstein the following morning at MCC to interview Harper before court that morning. When Rubenstein failed to appear by 9:00 a.m., Simels decided to meet briefly with Harper before reporting to the courtroom. (CA164). Simels proceeded to the attorney-client visiting area where he introduced himself to Harper as Brooks Davis' lawyer. When Simels asked Harper why he was at MCC, Harper seemed anxious to tell him about the events surrounding his arrest and detention. (CA170). Simels asked Harper if he had a lawyer and was told that although one had been with him the day before, whose name Harper did not know, he thought he was going to get his own attorney. (CA167). Simels testified that he had no reason to believe that Harper was hostile or to doubt his veracity. (CA170).

Simels recounted that Harper told him that he had been arrested on April 10th on a pretext and held incommunicado while he was questioned for seven hours about the Diggins shooting, and "was asked to lie on people" by whoever was present, the prosecutors or agents. (CA165-66). Harper said he was prepared to sign an affidavit detailing all that he had told Simels. (CA166). Simels converted the notes of his interview with Harper into affidavit form and arranged with a lawyer for one of the co-defendants to have someone bring the affidavit to Harper for

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[6] On April 28, 1988, Harper waived indictment and pleaded guilty to an information charging him with narcotics trafficking and racketeering conspiracy. He is awaiting sentence by the district court.

signature later that morning. (CA168). During the luncheon recess, Simels called Harper's mother for the name of the lawyer who had represented Harper at the arraignment. Simels then called the lawyer and left a message for him, finally speaking to him later that day or the following day. (CA169-70).

Michael Gavenchak, Esq. testified that he picked up the affidavit from Simels' office on April 12th and took it to MCC. (CA171). When he arrived, he told Harper that he was an associate of the lawyer who represented Wayne Davis and that he had a statement prepared by Simels for Harper's signature. According to Gavenchak, Harper took a copy of the affidavit and "proceeded to read it, at least he looked at each page . . . for anywhere from thirty seconds to a minute." After reviewing the affidavit, Harper signed four copies of the affidavit. (CA172).

AUSA Andrew McCarthy then testified that on the day of his arrest, Harper had given several contrary versions of the Diggins shooting during a four-hour interview at the U.S. Attorney's office before he settled on the version that appears in a written statement that Harper signed, in which he admitted to his role in the Diggins shooting and to having distributed narcotics for Wayne Davis. (CA173-83).

Following the "hearing", counsel for co-defendants Wayne Davis and Claddis Arrington announced that they intended to use Harper's statements to Simels and the affidavit to impeach Harper if the government offered evidence of Wayne Davis' request to Harper and the Diggins shooting. The district court declared a mistrial as to Wayne Davis and Claddis Arrington and ordered them severed. (CA237, 244). The following day, the government moved for a mistrial as to the remaining defendants, Brooks and Mary Davis. (CA563).

The petitioners proposed a variety of options to the court in an effort to avoid disqualification and a mistrial. Brooks Davis renewed his proposal not to cross-examine Harper on the events of April 12th (CA289), indeed, agreed not to cross-examine Harper at all but to rely either on the cross-examination of

counsel for Mary Davis or on the testimony of Mr. Gavenchak. (CA281, 290). Mary Davis also agreed not to cross-examine Harper on the events of April 12th at MCC but to challenge his testimony on general credibility grounds alone. (CA571). To further insure that Simels' credibility would not be placed before the jury, petitioners renewed their earlier suggestions regarding the redaction from Harper's testimony of any reference to Simels and proposed that Harper simply refer to a lawyer or "legal representative" for Brooks Davis, with an appropriate cautionary instruction from the court. (CA569-70). When Brooks Davis refused to stipulate to Harper's version of the events (CA290), the trial judge granted the government's motion to disqualify Simels from representing Brooks Davis and declared a mistrial as to both Brooks and Mary Davis. (CA291).

C. The District Court's Ruling

The district court granted the government's mistrial motion as to Brooks and Mary Davis in a ruling from the bench on May 2, 1988. (A31-51). The trial court made no finding that the charged narcotics conspiracy continued beyond the dates alleged in the indictment or that the charged conspiracy included a subsidiary understanding to obstruct justice. The trial court made no finding that Simels had threatened Harper or that by uttering the disputed threat he had joined a pre-existing narcotics conspiracy. To the contrary, the court earlier had actually ruled that: "I'm certainly making no finding that it [the purported threat] occurred." (CA185). The court ruled the challenged testimony admissible at trial simply on the basis that Harper would testify to a plot by the defendants to silence witnesses, and would include in this a claim that Robert Simels had threatened him. (A37, 40).

The trial court erroneously viewed it as a breach of the Canons of Ethics for Simels to have interviewed Harper without a third-party witness present (A41), and concluded that, as a result of this delict, Simels had transformed himself into a potential defense witness, or at least an unsworn witness, to the alleged obstruction scheme.

The court dismissed the various proposed remedies that would have permitted the trial to proceed, declining Brooks and Mary Davis' offer to forego cross-examination and summation on the alleged threat, and rejecting as "artificial" the suggestion that Aaron Harper simply omit Simels' name from his testimony. (A42). Disqualification and a mistrial were necessary despite petitioners' vigorous objection because, in the court's view, the proposed waivers and redactions would deprive Brooks Davis of "substantial rights" and "taint the trial." (A44; CA628). The trial court "reluctantly" (A46) included Mary Davis in its ruling, stating: "[T]here is really no possibility that the trial of Mary Davis can go on in the absence of the other defendants. The question of her guilt or innocence is intimately tied to the questions about her husband and even about the other defendants." (*Id.*).

In colloquy preceding the trial court's May 2nd ruling, the government had offered Simels' alleged threat against all of the defendants as an act or statement of a co-conspirator, under Fed. R. Evid. 801(d)(2)(E). (CA94). The trial court, however, never made preliminary findings under Fed. R. Evid. 104(a) of Simels' membership in a conspiracy with the defendants or that the alleged statement was made in furtherance of such a conspiracy. Indeed, far from finding by a preponderance of evidence that Simels in fact uttered the alleged threat and did so as a co-conspirator of the defendants, the trial court flatly refused to resolve the essential "questions of credibility" arising from Harper's and Simels' diametrically opposed versions of the meeting at MCC. (A43). The trial court's rulings, in the end, failed to specify any grounds for admitting Harper's statement regarding the alleged threat.

The trial court adopted its May 2nd ruling from the bench in a written opinion dated August 12th denying petitioners' motion to dismiss the charges that were the subject of the earlier trial on double jeopardy grounds. (A19-29).

D. The Court of Appeals' Decision

The Court of Appeals for the Second Circuit affirmed the district court's ruling in an opinion separately considering the

admissibility of Harper's testimony against Brooks and Mary Davis. (A1-18).

The Court of Appeals attempted to sweep aside claims under Fed. R. Evid. 104(a) regarding the admissibility of the alleged threat evidence:

> Brooks Davis' main objection to Harper's testimony is not based on "conventional evidentiary grounds." Rather, he contends that error lies in the failure of the district court to adhere to procedures which he claims were established by this court to govern the admissibility of evidence that tends to implicate counsel.

(A10). The Court of Appeals concluded that "[t]here are [no] special procedures to be followed, or balancings to be performed as a prerequisite to the evidentiary use of a defendant's counsel's out-of-court statements." The Second Circuit did not fasten on any "conventional evidentiary ground" to support the lower court's decision to admit evidence of the alleged threat, stating only that "we cannot say that it was an abuse of discretion to rule Harper's testimony fully admissible against Brooks Davis."[7] (A14).

The Court of Appeals affirmed the district court's exercise of its discretion rejecting Brooks Davis' waivers, disqualifying Simels, and aborting the trial. It characterized the conflict as an actual one, where the lawyer had to worry about allegations

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[7] Because the trial court never articulated a basis for admitting the challenged evidence, it is not clear whether it admitted the evidence against Brooks Davis on the basis of the underlying narcotics conspiracy or some separate conspiracy to obstruct justice. In affirming the trial court's decision to admit the evidence of the threat against Mary Davis, the court analyzed the question of its admissibility on the basis of the underlying narcotics conspiracy. It is not at all clear, however, whether a collateral conspiracy – an uncharged conspiracy that does not underlie the charged crime – can serve as an independent basis for admitting a co-conspirator's statement. If the Court determines from the record that the evidence was admitted on the basis of a separate conspiracy to obstruct justice, we submit that that issue presents an independent basis for granting the writ.

of his own misconduct, "not the more usual one of multiple representation." (A15). Quoting this Court's decision in *Wheat v. United States*, 486 U.S. ____, 108 S. Ct. 1692 (1988), the Court of Appeals recognized that "courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession" and adopted the district court's conclusion that "by waiving the right to call Simels, 'Brooks Davis would be foregoing the presentation of the most relevant evidence on the point.' " (A16). In these circumstances, the Court of Appeals concluded, Brooks Davis would have been represented by counsel encumbered with a strong incentive to minimize his own exposure to prosecution and the trial court properly could decline the proffered waiver of any potential conflict. (A16-17).[5]

As for Mary Davis, the court ruled that Simels' alleged threat was admissible against her under Fed. R. Evid. 801(d)(2)(E) as a statement by a co-conspirator [Simels] in furtherance of the narcotics conspiracy charged in the indictment. The Second Circuit, citing its own cases, stated that Simels' membership in the conspiracy "may be shown by a quantum of proof 'lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury.' " The Court of Appeals rejected the petitioners' argument under *Krulewitch v. United States*, 336 U.S. 440 (1949), that the alleged statement did not further the charged narcotics conspiracy but was, at best, an after-the-fact effort to avoid prosecution for completed conspiratorial acts. The Court of Appeals concluded that the narcotics conspiracy charged was not designed to bring about a single, completed,

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[5] It is significant that the trial court initially took a very different view and concluded that the interests of the accused and his counsel actually were congruent. (CA116). In fact, although the Court of Appeals speaks in terms of an actual conflict of interest, the record plainly belies that conclusion. Despite the allegation of wrongdoing, Simels' representation remained vigorous. Rather than concealing the incident, he requested a hearing, sought to cross-examine the witness about it and actually testified about the matter. In *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984), upon which the Court of Appeals relied, trial counsel actually concealed his alleged wrongdoing from his client. In such circumstances a knowing waiver of conflict-free counsel would be impossible.

illegal result, and that the plot to silence witnesses "further[ed] the goals of the conspiracy in that the distribution of narcotics would be facilitated by the acquittal of all the defendants." Significantly, the Court of Appeals posited no evidence to support its *de novo* determination that the underlying narcotics conspiracy continued beyond the dates set forth in the indictment or its conclusion that the subject conspiracy included an ancillary agreement to obstruct justice.

REASONS FOR GRANTING THE WRIT

This case represents an extraordinary and unprecedented restriction of constitutional protections concerning both the right to counsel and double jeopardy. In ruling evidence of the alleged threat admissible, ordering the disqualification of trial counsel and declaring a mistrial as to Brooks and Mary Davis, the Court of Appeals has disregarded the rule of *Bourjaily v. United States* and sound procedural safeguards it had developed regarding the evidentiary use of statements by an accused's trial counsel. In sustaining the trial court's refusal to honor Brooks Davis' knowing waiver of conflict-free counsel, the Second Circuit also has misconstrued *Wheat v. United States* and disregarded its own precedent recognizing that a defendant may waive his right to conflict-free counsel just as he may knowingly waive any other constitutional right. It posits instead, a dangerous rule that substitutes the judgment of the trial court for the informed decision of the accused. Because of its impact on fifth amendment double jeopardy protections, the mid-trial disqualification of counsel must be manifestly necessary and is not subject to the discretionary standard explicated in *Wheat* and rotely applied here by the Second Circuit. Finally, in ruling the challenged evidence admissible against Mary Davis as a co-conspirator's statement, the Second Circuit has created a new and radically broad species of conspiracy, obliterating the teaching of this Court in cases such as *Krulewitch v. United States*, 336 U.S. 440 (1949).

Aside from important evidentiary issues, the decision below thus raises constitutional questions of paramount significance regarding both double jeopardy protections and the right to

counsel. By ruling that, in a criminal case, an attorney is subject to disqualification and that a mistrial can be ordered on the vague, uncorroborated, and, finally, untested allegation of a witness, the Second Circuit has eviscerated the right to counsel of choice and has ignored the accused's right to have his case heard by the tribunal of his choice. If this ruling stands, disqualification will be virtually automatic and if a trial is in progress a mistrial ordered – anytime anyone raises a question about the conduct of counsel which may subject him or her to disciplinary action or a criminal prosecution. In the end, however attenuated or implausible the claim, counsel will be disqualified on the theory that what a particular court regards as effective assistance of counsel supersedes the defendant's choice of counsel. This Court has yet to consider the interplay of these sometime antagonistic rights in the context of a trial actually in progress and the circumstances, if any, in which one may take precedence over the other. Certiorari is warranted for his Court's authoritative guidance on this difficult question.

I. THE DECISION OF THE COURT OF APPEALS VIOLATES THE RULE OF *BOURJAILY v. UNITED STATES* REQUIRING THAT THE ADMISSIBILITY OF DECLARATIONS AND ACTS OF CO-CONSPIRATORS BE DETERMINED PURSUANT TO FED. R. EVID. 104(a) BY THE TRIAL COURT PRELIMINARILY AND UNDER A FAIR PREPONDERANCE OF EVIDENCE STANDARD.

Under this Court's ruling in *Bourjaily v. United States*, 483 U.S. 171 (1987), before admitting the challenged evidence, the trial court was required by Fed. R. Evid. 104(a) to make a preliminary determination under a fair preponderance standard that a conspiracy existed involving both the petitioners and the declarant and that the statement was made in the course of and in furtherance of the charged conspiracy. The trial court, however, refused to resolve critical preliminary factual issues regarding the admissibility of evidence – indeed never took

evidence for that purpose.[9] Instead, it ruled the evidence admissible, despite flatly contrary testimony, simply because it found a basis for it, leaving serious credibility issues for the jury to resolve. To rule that disputed evidence was admissible, without first determining these preliminary issues, including critical credibility questions, or taking evidence for that purpose is contrary to this Court's teaching in *Bourjaily* and other cases holding that questions of admissibility must be determined by a trial court outside the presence of the jury under a fair preponderance of the evidence standard. *Bourjaily v. United States*, 483 U.S. at 176, citing *Colorado v. Connelly*, 479 U.S. 157 (1986); *Nix v. Williams* 467 U.S. 431, 441, n.5. (1984); *United States v. Matlock*, 415 U.S. 164 (1974); *Lego v. Twomey*, 404 U.S. 477 (1972).

The fundamental fact affecting the admissibility of the alleged threat in this case is that it was uttered by a third party rather than by Brooks Davis, Mary Davis or even one of their co-defendants. As a general matter, a third-party statement can be

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[9] In its opinion the Court of Appeals recognized that the purpose of a hearing was "solely to determine if Harper would testify at trial in a manner consistent with the government's proffer." (A6). This is not surprising since the trial judge himself was so clear in his purpose:

> I emphasize over and over again, and we are repeating ourselves because we keep really spinning our wheels here, that my only purpose is to determine whether the witness will testify before the jury in accordance with the government's letter.
>
> The ultimate question about the credibility of the witness and, indeed, the ultimate question of how all this came about, that is going to be for jury, provided the witness will testify. (CA 107-08).

But, as the Court made plain in *Bourjaily*, it is no answer for the trial court to say that these questions are for the jury. *Bourjaily* specifically teaches that the admissibility of such statements is a question for the court, not the jury. The trial court should have permitted the defendants to cross-examine Harper and the government to cross-examine Simels and should have received any other evidence that was relevant on the credibility issues that were essential to a determination of whether disputed evidence was admissible at trial. *See United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 1986), citing *United States v. Enright*, 579 F.2d 980, 986 (6th Cir. 1978); *see also United States v. Terry*, 702 F.2d 299, 320 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983).

admitted against a defendant under Fed. R. Evid. 801(d)(2)(E) if the declarant and defendant are co-conspirators and the statement is made during and in furtherance of their conspiracy. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Nixon*, 418 U.S. 683 (1974). Alternatively, a statement can be attributed to a defendant by proof of an agency relationship between the declarant and the defendant under Fed. R. Evid. 801(d)(2)(C) and (D).[10] For a trial court to admit a third-party statement against a defendant under either of these theories, however, it must first make preliminary findings under Fed. R. Evid. 104(a) that the necessary conspiratorial or agency relationship existed between the declarant and the defendant. *Bourjaily v. United States*, 483 U.S. 171, 181 (1987). *See United States v. Ziegler*, 583 F.2d 77, 80 (2d Cir. 1978) (trial court erred in leaving preliminary factual determinations to the jury). Where the preliminary facts relevant to admissibility are disputed, the trial judge must find these facts by a preponderance of evidence before admitting the proffered evidence. *Bourjaily v. United States*, 483 U.S. at 176. *See, e.g., United States v. Mastropieri*, 685 F.2d 776, 787-89 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982); *United States v. Ziegler*, 583 F.2d at 80; *see generally* Weinstein and Berger, *Weinstein's Evidence*, ¶ 104 [05], 104-39-44 (1988).

Whether a statement attributed to counsel is properly admissible in evidence is no different than any other admissibility question that turns on a preliminary factual determination. In the specific context of this case, before admitting the alleged threat against petitioners as a statement of a co-conspirator, the trial court thus was required under Fed. R. Evid. 104(a) to determine by a fair preponderance of the evidence that a conspiracy existed involving petitioners, that trial counsel for Brooks Davis

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[10] Although the threat evidence was not offered for its truth, the Second Circuit analyzed the question of its admissibility under Fed R. Evid. 801. We see no principled difference whether the threat's admissibility is analyzed as a statement or an act. In both instances, the foundation of admissibility derives from agency principles: Whatever the agent does, within the scope of his authority, binds his principal and is deemed his act. In a conspiracy case once the conspiracy is established, the act of one conspirator in pursuit of the enterprise is the act of all. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827), *cited* in *Bourjaily v. United States*, 483 U.S. at 183.

was a member of that conspiracy, and that the alleged threat furthered the objects of the charged conspiracy. *See Bourjaily v. United States*, 483 U.S. at 180; *United States v. Lyles*, 593 F.2d 182, 194-95 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979). Because the government's proof of the threat was sharply contested, the trial court could only have made this preliminary determination by weighing the witness's allegation of a threat against trial counsel's flat denial. For this reason, the witness's credibility should have been *the central issue* for the trial court in determining whether to admit the challenged testimony against Brooks and Mary Davis.

Rather than permitting meaningful exploration of the witness's testimony through cross-examination or an inquiry of its own that would have permitted an assessment of the witness's credibility, the trial court refused to make a finding that the threat occurred (CA105), ruled the testimony admissible (CA234-35) and left the credibility issue to the jury. (CA107-08, 309). The district court never made a finding that trial counsel uttered the threat or that by uttering the threat he joined the charged narcotics conspiracy. In fact, the trial judge never set forth a basis for admitting the subject evidence. By ducking the preliminary findings necessary to a determination of admissibility, the trial judge abdicated his responsibility under Fed. R. Evid. 104(a). *See Bourjaily v. United States*, 483 U.S. at 178-79; *United States v. Ziegler*, 583 F.2d at 80.[11]

In cases such as *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984), *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), and *United States v. Valencia*, 826 F.2d 169 (2d Cir. 1987), the Second Circuit, recognizing that disqualification of counsel of choice should be a

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[11] Of course, trial courts often implicitly make the requisite findings. *See, e.g., United States v. Lyles*, 593 F.2d 182, 194 n.15 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979). An implicit credibility finding is impossible here because the trial judge never took evidence for that purpose, indeed expressly eschewed such a finding, leaving it to the jury to determine. (CA 107-08). In fact, by admitting the evidence without holding the government to the fair preponderance standard, the trial court adopted the substantial evidence standard rejected by the Court in *Bourjaily*.

measure of last resort, prescribed care and precision in making decisions regarding admission of a trial attorney's statements against his client. In *McKeon* the Second Circuit cautioned that evidentiary use of an attorney's statements "must be circumscribed in order to avoid trenching upon other important policies." 738 F.2d at 32. More recently, in *Valencia*, the court reemphasized that "care must be exercised in the criminal context in determining under what circumstances attorney statements may be used against a client." 826 F.2d at 172. *Valencia* discouraged the evidentiary use of attorney statements and warned that "routine use of attorney statements against a criminal defendant risks impairment of the privilege against self-incrimination, the right to counsel of one's choice, and the right to effective assistance of counsel." *Id.* The Court of Appeals' holding here that counsel's alleged statement was admissible not only ignores the fact that admission of this evidence violated general evidentiary procedures for admitting third-party statements, but also disregarded its own salutary prescriptions cautioning against routine evidentiary use of attorneys' statements. Because admission of the evidence precipitated a mistrial, the Second Circuit's decision also impinges upon petitioners' guarantees against double jeopardy.

The Second Circuit held that *Cunningham*, *McKeon* and *Valencia* did not require the district court to hold a "special hearing" regarding admissibility of trial counsel's alleged threat but merely apply the general evidentiary principles embodied in Fed. R. Evid. 104(a).[12] Petitioners never requested a "special" hearing. Rather, the hearing that should have occurred in the trial court is no more nor less than that required under Fed. R. Evid. 104(a) as a prerequisite to the trial court's decision to admit the proffered evidence. The only special procedures petitioners urged related to the balancing of competing rights that a trial court must perform once an attorney's statement is determined to be otherwise admissible in accordance with routine evidentiary principles.

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[12] The Court of Appeals characterization that "Brooks Davis' main objection to Harper's testimony is not based on conventional evidentiary grounds" (A10.) is mistaken. In fact, we consistently argued in written submissions and during oral argument that the trial court's failure to comply with the conventional requirements of Fed. R. Evid. 104(a) was error.

In fact, applying the procedures contemplated by *McKeon* and *Valencia* is necessary to protect the rights of the accused. Trial courts have broad latitude in determining the order of proof and often receive evidence of a co-conspirator's act or statement subject to connection or some other preliminary determination. Usually, any error in conditionally receiving evidence in this manner can be cured by later striking it and giving an appropriate curative instruction to the jury. No curative instruction can remedy the obvious harm occasioned by the disqualification of counsel and declaration of a mistrial. In analogous situations, where the harm to the defendant occasioned by the admission of evidence is irremediable, trial courts often are required to hear evidence on a preliminary question outside the presence of the jury and make a final decision regarding admissibility before receiving the challenged proof. *See, e.g., United States v. James*, 590 F.2d 575, 579 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *Jackson v. Denno*, 378 U.S. 368 (1964). Requiring the trial court to take evidence and to determine preliminary issues regarding the admissibility of counsel's statements before disqualifying counsel makes sound procedural sense and provides necessary protection to the defendant's sixth amendment right to counsel of choice and, in the context of disqualification during trial, the accused's fifth amendment protections against double jeopardy. *See United States v. Cunningham*, 672 F.2d at 1070.

The Second Circuit's decision eviscerates the salutary rules developed in *Cunningham*, *McKeon* and *Valencia* requiring that the evidentiary use of counsel's statements be approached with marked circumspection. Under these cases, rules of admissibility must be strictly followed in considering evidentiary use of an attorney's statement and, if the proffered evidence is found otherwise admissible, the trial court must then weigh the government's need for the evidence against the defendant's sixth amendment right. When the evidence is first proffered in the middle of trial, the government's need for the evidence must be especially acute, and the evidence highly probative of guilt, to justify aborting a trial in progress. This determination, as the Second Circuit recognized in *Cunningham*, requires a "complete record." 672 F.2d at 1075.

The record here is so truncated, vague and convoluted that the Second Circuit itself observed in its opinion that "What occurred at this meeting [when the threat allegedly was uttered] is not clear." A5. The Court of Appeals, nevertheless, sustained admission of the challenged evidence on an inadequate record and concluded that no "special balancings" were required before admitting trial counsel's out of court statement, disqualifying counsel and declaring a mistrial. A12-13. Even if the sixth amendment rights of the accused do not require a special balancing of competing interests – and, we submit, they do – double jeopardy protections implicated by the mid-trial disqualification of counsel require scrupulous adherence to the general rules governing the admissibility of third-party declarations and a cautious weighing of the accused's right to counsel of choice and the prosecution's need to offer such proof.

Until this case it seemed clear that authority in the Second Circuit concerning the evidentiary use in criminal trials of statements by trial counsel required scrupulous adherence to the requirements of Fed. R. Evid. 104(a) and a cautious balancing of the rights of the accused. Certiorari is warranted to resolve the important questions raised by the Second Circuit's sudden retreat from sound procedural and constitutional principles.

II. THE SECOND CIRCUIT'S DECISION REPRESENTS AN UNWARRANTED EXTENSION OF *WHEAT v. UNITED STATES* AND THREATENS THE CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE AND PROTECTIONS AGAINST DOUBLE JEOPARDY.

The Court of Appeals' decision eviscerates the right to counsel of choice and double jeopardy protections by its sweeping conclusion that the purported conflict could not be waived. (A16).

We are unaware of any prior decision that has sustained the mid-trial disqualification of counsel on any basis but manifest necessity. *See, e.g., United States v. Kwang Fu Peng*, 766 F.2d 82 (2d Cir. 1985). The Court of Appeals, relying on broad language in *Wheat v. United States*, 486 U.S. __, 108 S. Ct. 1692

(1988), assumed that, because the defendant would have been forced to forego his right to challenge evidence as to a collateral matter, the purported conflict would have undermined the fairness of the trial and so could not have been waived.

Wheat is distinguishable on a number of grounds. To begin with, *Wheat* addressed sixth amendment rights *prior* to trial, where the seriousness of the perceived conflict is vague and hard to define; it did not involve the right to counsel at a pending trial, with its concomitant impact on guarantees against double jeopardy. *Wheat* also involved the issue of multiple representation and so differs because it implicated the constitutional rights of a third party which could not be protected by the defendant's waiver. By contrast, here only petitioner's right to conflict-free counsel was implicated and the contours of the conflict were sharply defined and cognizable by the accused.

In fact, the Court's recent decision in *Wheat v. United States* is illustrative of the kinds of institutional concerns that might justify a trial court's decision to override a defendant's knowing waiver of his attorney's conflict of interest. In *Wheat*, the petitioner moved to substitute counsel two court days prior to trial. Proposed new counsel had represented two potential witnesses against the petitioner. When the lawyer asked to be substituted as trial counsel for the petitioner, the district court refused, on the ground that an irreconcilable conflict of interest existed which could not be waived.

This Court affirmed the conviction after trial. 108 S.Ct. at 1700. It found that the trial court was justified in exercising its broad discretion to refuse to substitute counsel because there existed a substantial potential for a serious conflict that would impair the ability of counsel to represent his client. *Id.* at 1699. Since a nascent conflict could have developed at trial into one that would have impaired the effectiveness of counsel, it was virtually impossible to ensure that the accused's pretrial waiver of conflict-free counsel was an informed decision and that the fundamental fairness of the trial would not be affected. In these circumstances, the Court found that the institutional interests favoring just verdicts in criminal cases justified vesting broad discretion in the trial court to refuse requests to substitute counsel. *Id.* at 1699-1700.

Of course, the situation presented where a conflict involving trial counsel develops in the middle of a trial is decidedly different from that presented prior to trial. Once the trial starts and jeopardy attaches, the dimensions of a conflict are clear and easier to remedy. Unlike the concerns implicated in *Wheat* by a last minute request to substitute counsel before trial begins, disqualification which precipitates a mistrial, because of double jeopardy guarantees, implicates a higher standard and must be manifestly necessary. *See Arizona v. Washington*, 434 U.S. 497, 505 (1978). The Court of Appeals overlooked this vital distinction and improperly applied *Wheat's* lower abuse of discretion standard which obtains prior to trial.

The very concerns that justified the trial court's exercise of its discretion not to permit a substitution of counsel in *Wheat* were not present here. Petitioner's decision to waive any conflict of interest, keep the jury and proceed with counsel of choice was not made in a vacuum: the nature and contours of the problem were known to him and he also understood the benefits of continuing the trial with the lawyer he had chosen and before the jury that was hearing the case against him. The consequences of the decision not to assail the witness's credibility directly were minimal. It is because of this delicate balancing of competing personal rights that, absent some demonstrable harm to the integrity of the trial, the decision whether to proceed with counsel of choice or one free of a conflict of interest finally must rest with the defendant. *See United States v. Curcio*, 680 F.2d 881, 885 (2d Cir. 1982).

To be sure, a conflict of interest may impair counsel's effectiveness in assisting his client. A defendant in a criminal case nonetheless should be allowed to knowingly waive his right to conflict-free counsel just as he may knowingly waive any other constitutional right, including the right to effective counsel. *See Faretta v. California*, 422 U.S. 806, 820 (1975); *United States v. Curcio*, 680 F.2d 881, 885 (2d Cir. 1982); *United States v. Armedo-Sarmiento*, 524 F.2d 591, 593-94 (2d Cir. 1975); *see generally Johnson v. Zerbst*, 304 U.S. 458 (1937).[13] To the

[13] We also question the Second Circuit's unexamined assumption that counsel was burdened by an actual conflict of interest. The conclusion that counsel

(*Footnote continued*)

extent that the trial court questioned whether the waiver here was knowing and intelligent, it should have permitted the defendant to meet with independent counsel, as he planned (CA280; CA572), or, if the court was concerned about delay, it should simply have appointed independent counsel to advise him. *See United States v. Curcio*, 680 F.2d at 885. To posit, as the Court of Appeals has, that this decision belongs to the trial court and not the defendant, especially where other equally compelling constitutional rights are implicated, is indeed novel and dangerous.

Certiorari is important to define the standard governing the disqualification of counsel during trial and to delineate those extraordinary circumstances where the trial court in the middle of a trial may be justified in substituting its judgment for that of the accused. Surely, where a criminal trial is actually in progress, a court cannot be allowed to override the informed judgments of the accused as to whether the right to conflict-free counsel should take precedence over the "valued right to have his trial completed before a particular tribunal." *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). To say that mid-trial disqualification of counsel of choice which precipitates a

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had a strong incentive to conduct the trial in a manner that would minimize his own exposure to prosecution is belied by the record. In fact, the trial judge thought that the petitioner's interests coincided with those of his lawyer (CA116) and the trial court made no findings to support the Court of Appeals' *ipse dixit* to the contrary. Counsel's representation was vigorous throughout the trial, even after disclosure of his alleged wrongdoing. Rather than attempting to conceal the incident, counsel requested a full hearing on the matter (CA550), asked to cross-examine the witness (CA152-54) and actually testified about the matter. (CA170). The decision to forego cross-examination of the witness before the jury was a conscious choice by the defendant to continue with his chosen lawyer and the jury he had selected, not the result of counsel's attempt to conceal his alleged wrongdoing or to protect himself. *Compare United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984)(where counsel's alleged wrongdoing was unknown to the defendant a vigorous defense might uncover evidence or prompt testimony revealing counsel's own crimes) *with United States v. Cunningham*, 672 F.2d 1064, 1072 (similar allegations of witness tampering that were known to the accused did not spawn a non-waivable conflict of interest).

mistrial over informed and vigorous objection is necessary to protect the rights of the accused turns both fifth and sixth amendment guarantees on their heads: "When the administration of the criminal law . . . is hedged about as it is by the constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards is . . . to imprison a man in his privileges and call it the Constitution." *Adams v. United States*, 317 U.S. 269, 280 (1942).

III. THE RULING BELOW THAT EVIDENCE OF THE ALLEGED THREAT WAS INDEPENDENTLY ADMISSIBLE AGAINST MARY DAVIS UNDER FED. R. EVID. 801(d)(2)(E) IGNORES THE *KRULEWITCH* PRINCIPLE AND ADOPTS A NOVEL AND DANGEROUSLY BROAD THEORY OF THE LAW OF CONSPIRACY.

The Second Circuit sustained the admission of the alleged threat evidence against Mary Davis on the novel theory that it furthered the charged narcotics conspiracy in that "the distribution of narcotics would be facilitated by the acquittal of all the defendants." (A18). But there simply is no evidence, and the district court never found, that the charged conspiracy continued to the time of this alleged threat or that the conspiratorial agreement included an ancillary agreement to obstruct justice. The decision of the Court of Appeals represents an unwarranted and mischievous extension of the law of conspiracy.

In *Krulewitch v. United States*, 336 U.S. 440 (1949), and *Lutwak v. United States*, 344 U.S. 604 (1953), this Court held that statements intended merely to prevent detection of and punishment for past conspiratorial exploits are not admissible under Fed. R. Evid. 801(d)(2)(E) against the declarant's former conspirators.[14] The Second Circuit reasoned (without any

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[14] To extend a conspiracy into the concealment phase for purposes of Rule 801(d)(2)(E) throws the "narrow exception" open to a wide variety of statements

(*Footnote continued*)

supporting authority) that the sound limiting principle established in *Krulewitch* and its progeny, *see Grunewald v. United States*, 353 U.S. 391 (1957); *Lutwak v. United States*, 344 U.S. 604 (1953), applies only where the charged conspiracy is directed at achieving a single completed goal. The court below held that where a conspiracy has a long-term objective, as did the narcotics conspiracy charged here, it can be deemed to continue indefinitely, despite the conspirators' arrest and incarceration and the lack of any evidence that the conspiracy in fact continued to operate or included an ancillary objective to obstruct or impede prosecution.

The reasoning of the Court of Appeals that the charged conspiracy continued is wrong on a number of counts. To begin with, there is no evidence that the charged conspiracy continued some six months beyond the date of the indictment, arrest or incarceration of the defendants in October 1987 to the date of the alleged threat in April 1988. The trial judge never found that the conspiracy continued or that it included some ancillary purpose. For that matter, he never found that Simels had uttered the threat or that by doing so he had joined the charged conspiracy. He made no findings regarding the scope and duration of the conspiracy and could only surmise that the defendants "could [have been] very eager to get [the conspiracy] . . . back going." (CA354).

Indeed, it is not at all clear just how an acquittal would further the objects of a narcotics conspiracy in any event. Certainly, it would free the defendants, and so, one might say the defendants would be free to continue their illegal acts. But the connection between an acquittal and the objectives of the underlying conspiracy, as *Krulewitch* teaches, is too attenuated to say that acquittal inexorably furthers the underlying illegal scheme. In short, the Second Circuit's reasoning is both too capacious and begs the essential questions regarding the scope and duration of the conspiratorial agreement. Finally, *United States v.*

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intended to shield the co-conspirators. *Krulewitch*, 336 U.S. at 444. Sanctioning such an amorphous theory would extend to almost an endless variety of hearsay declarations which arguably could impede government efforts to secure convictions.

Persico, 832 F.2d 705 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988) and *United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978), upon which the Court of Appeals relied, are distinguishable because there was ample evidence in those cases that the primary purposes of the charged conspiracy continued at least to the time of the co-conspirator-declarant's proffered statement. In petitioners' case, there was no evidence that the conspiracy continued after the indictment and arrest to the time of the alleged threat. Indeed, if the panel is correct in its conclusion that counsel joined the underlying conspiracy by uttering the challenged remarks, then he did so following the indictment, arrest and incarceration of his alleged co-conspirators, an untenable assumption, to say the least. It appears that the Court of Appeals has substituted unlikely surmise and speculation for hard evidence as to the scope of the conspiratorial agreement and its duration.

The Second Circuit here endorsed a novel "perpetual conspiracy" rule that is the polar opposite of the principles expounded by this Court in *Krulewitch* and its progeny. This radical reinterpretation of settled law stretches beyond limit and reason the already "sprawling and pervasive offense" of conspiracy. *See Krulewitch*, 336 U.S. at 445 (Jackson, J., concurring). This Court is urged to consider whether this dramatically expansive revision of the law of conspiracy is necessary or appropriate.

CONCLUSION

For the foregoing reasons, Brooks and Mary Davis' petition for a writ of certiorari should be granted.

Dated: New York, New York
May 30, 1989

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 402, 403, 409, 503—August Term, 1988

(Argued: November 10, 1988

Decided: January 23, 1989)

Docket Nos. 88-1351, 88-1353, 88-1378, 88-1394

UNITED STATES OF AMERICA,

Appellee,

—v.—

CLADDIS ARRINGTON, BROOKS GREGORY DAVIS, MARY FERGUSON DAVIS, and WAYNE DAVIS,

Defendants-Appellants.

Before:

LUMBARD, VAN GRAAFEILAND, and ALTIMARI,
Circuit Judges.

Appeal from an order denying defendants' motions to dismiss indictment on the ground that retrial is barred by the double jeopardy clause, entered in the United States District Court for the Southern District of New York (Thomas P. Griesa, *Judge*).

Affirmed.

RICHARD B. LIND, New York, NY, *for Defendant-Appellant Arrington.*

VICTOR ROCCO, New York, NY (James A. Altman, Julie A. Prag, Botein Hays & Sklar, New York, NY, of counsel), *for Defendants-Appellants Brooks Davis and Mary Davis.*

RICHARD WARE LEVITT, New York, NY, *for Defendant-Appellant Wayne Davis.*

DANIEL C. RICHMAN, Assistant United States Attorney for the Southern District of New York, New York, NY (Rudolph Guiliani, United States Attorney for the Southern District of New York, Celia Goldwag Barenholtz, Assistant United States Attorney for the Southern District of New York, New York, NY, of counsel), *for Appellee.*

DAVID B. SMITH, Alexandria, VA (English & Smith, Alexandria, VA, of counsel), *for Amicus Curiae National Association of Criminal Defense Lawyers.*

ALTIMARI, *Circuit Judge*:

Defendants-appellants Claddis Arrington, Brooks Gregory Davis, Mary Ferguson Davis, and Wayne Davis appeal from an order entered in the United States District Court for the Southern District of New York (Griesa, *J.*), which denied their motions under Fed. R. Crim. P.

12(b)(1) to dismiss criminal charges against them. Defendants were charged with various offenses arising from participation in a conspiracy to distribute narcotics. Soon after the commencement of trial, the government informed the court of an alleged plot to silence witnesses, and the possible involvement of counsel for Brooks Davis in that plot. On April 28, 1988, the court declared a mistrial as to Arrington and Wayne Davis. On May 2, 1988, mistrials were declared as to Brooks and Mary Davis.

After the government announced that it intended to retry all four defendants, the defendants moved to dismiss the charges. The defendants argued that retrial is barred by the double jeopardy clause because there was no "manifest necessity" to declare the mistrials. Defendants renew this argument on appeal. For the reasons stated below, we affirm the decision of the district court as to all defendants.

BACKGROUND

In a superseding indictment filed March 26, 1988, Arrington, Brooks Davis, Mary Davis, and Wayne Davis were charged, *inter alia*, with conspiring to possess and distribute narcotics in violation of 18 U.S.C. § 841. The government alleged that defendants were part of a large-scale narcotics distribution organization, in which Brooks Davis was king-pin, Wayne Davis was lieutenant, Arrington was a dealer, and Mary Davis supplied customers.

Among the witnesses the government intended to call to testify at trial were Keith Greene and Henri Mitchell. Both Greene and Mitchell had pleaded guilty to narcotics offenses and entered into cooperation agreements with the government. Prior to trial, however, Greene and Mitchell

each gave sworn statements to defense counsel recanting previous sworn statements they had given to the government. The government also intended to call Isaac Diggins, an informant who had secretly recorded conversations with Arrington and Brooks Davis. Two days before trial was to begin, however, Diggins was shot.

On April 10, 1988, the day after the shooting, Aaron Harper confessed to his role in the attempted murder of Diggins. Harper told the government that Wayne Davis had called him a few weeks earlier and asked for his help in locating and murdering potential witnesses in the upcoming trial. Harper further related that on April 9, 1988, defendant Arrington and another unidentified man ordered Harper, upon threat of death to himself or his family, to arrange for Diggins to be at a specified location that night so that he could be killed. Harper complied. On April 28, Harper entered guilty pleas to charges arising from his involvement in both the Diggins shooting and drug transactions with Wayne Davis.

On April 11, 1988, the first day of jury selection, the government made various motions based on the information furnished to it by Harper, whose identity was kept confidential. The court granted motions for an anonymous jury and to remand Arrington, Mary Davis, and Wayne Davis, who had been released on bail, but denied a motion for a continuance.

After the defendants were returned to custody, Harper was inadvertently placed in the same holding cell in the Metropolitan Correctional Center ("MCC") as Arrington, Brooks Davis, and Wayne Davis. A conversation ensued between the men, at the end of which Brooks Davis stated that he would send his lawyer to see Harper. Harper testified that Brooks Davis told him that the pur-

pose of the lawyer's visit was for Harper to sign a paper stating that he "ain't going to testify." The next morning, Robert Simels, who was Brooks Davis' counsel, visited Harper alone at the MCC. What occurred at this meeting is not clear.

On April 12, 1988, Simels presented the court with an affidavit signed by Harper, whom Simels identified as the government's confidential informant. The affidavit stated that the government had pressured Harper to "lie on people," and it presented an explanation of the Diggins shooting that differed from the government's account. It further stated that Harper did not take part in, or have knowledge of, any illegal activities involving Brooks Davis, Wayne Davis, or Mary Davis. Simels later testified that he met alone with Harper at the MCC, and Harper freely related a version of events that contradicted the version offered by the government. Simels testified that he prepared the affidavit from his notes of the meeting, and then made arrangements for Michael Gavenchak, an associate of counsel for Wayne Davis, to bring the affidavit to Harper to sign. In the meantime, the trial went forward with Simels assuming the role of lead defense counsel.

After the sixth day of trial, the government filed a letter with the court which set forth new information regarding the circumstances of Harper's recantation. The government alleged that during their MCC meeting, Simels warned Harper that he should not testify against his "friends" from the "street while [his] family [was] out there." The government further alleged that Harper signed the paper presented to him by Gavenchak without reading it. At this time, the government did not move for a mistrial, but did raise the issue of whether Simels could

ethically continue as Brooks Davis' trial counsel since Simels might now become a witness at trial.

The district court held a series of conferences with counsel for all parties to consider whether disqualifications of counsel and/or declarations of mistrials were required. During these conferences, the government announced its intention to call Harper to testify about his drug activities with the defendants, the Diggins shooting, and the Simels threat. The defendants indicated their desire to defend against this evidence. According to the district court, the next step was "to determine whether Harper would really testify in a way to implicate and accuse Mr. Simels," because if Harper would not so testify then Simels would not become a witness in the case, and disqualification would be unnecessary. To this end, a hearing was held outside the presence of the jury, solely to determine if Harper would testify at trial in a manner consistent with the government's proffer. Harper's testimony at this hearing was in substantial conformity with the government's accounts of the attempted murder of Diggins and the events at the MCC.

Following the hearing, counsel for Arrington and Wayne Davis reasserted their intention to call Simels to testify. The court found that Arrington and Wayne Davis were entitled to present Simels' testimony in their defense but that Simels could not appear as a witness before the same jury that observed him perform as lead defense counsel. The court declared mistrials as to Arrington and Wayne Davis. The court endeavored, however, to continue the trial with regard to Brooks and Mary Davis.

Over the next day and a half, the district court heard oral argument and received written submissions as to whether further mistrials could be avoided. To this end,

Brooks and Mary Davis offered to waive cross-examination of Harper. Other suggestions, such as having an adjournment of the trial in order to allow the appointment of new counsel for Brooks Davis, were also put forth. The court found none of the suggested solutions to be workable. It characterized the proposed waivers as "foregoing the presentation of the most directly relevant evidence . . . contradicting Harper's version." Furthermore, the court found that Simels' testimony would "be of great assistance to Brooks Davis if it were true." Accordingly, the court disqualified Simels from continuing as counsel for Brooks Davis. Then, finding that it "would present hopeless confusion and difficulty in the minds of the jurors to have Mr. Simels act at the beginning of the trial in his vigorous and lead role as defense counsel, and suddenly to have him depart and come back as an accused party and a witness," the court declared mistrials as to the remaining defendants.

DISCUSSION

A. *Claddis Arrington and Wayne Davis.*

Arrington and Wayne Davis contend that their retrial is barred by the fifth amendment because there was no manifest necessity to declare mistrials against them. Specifically, they argue that since it was not their counsel who was to become a witness at trial, the declaration of mistrials as to them was improper. We disagree.

The fifth amendment does not bar retrial where there is "manifest necessity" to declare a mistrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). "Under this standard, the prosecution bears the 'heavy' burden of showing a mistrial to have been demanded by a 'high

degree' of necessity." *United States v. Kwang Fu Peng*, 766 F.2d 82, 85 (2d Cir. 1985) (quoting *Arizona v. Washington*, 434 U.S. 497, 505-06 (1978)). The finding of manifest necessity does not lend itself to the simple application of precise formulas or rigid rules. Thus, "[a] great deal of discretion [is] vested in the trial judge, who is usually best situated to determine the degree of necessity for the declaration of a mistrial." *Dunkerly v. Hogan*, 579 F.2d 141, 145 (2d Cir. 1978), *cert. denied*, 439 U.S. 1090 (1979). The trial judge's evaluation is entitled to "the highest degree of respect." *Washington*, 434 U.S. at 511; *see also United States v. Ruggiero*, 846 F.2d 117, 123 (2d Cir.), *cert. denied*, 57 U.S.L.W. 3376 (1988); *United States v. Mastrangelo*, 662 F.2d 946, 950 (2d Cir. 1981), *cert. denied*, 456 U.S. 973 (1982).

During the trial, Arrington and Wayne Davis announced their intention to call Simels to testify about a critical issue in the case. The problem created by this proposed testimony is not, as argued by defendants, strictly an issue of conflict between an attorney and his client. Regardless of which defendant Simels represented, the jury observed him acting as lead counsel during the entire trial. Thus, the problem presented by Simels' dual role of attorney and witness is whether such a performance so blurs the line between argument and evidence that the jury's ability to find facts is undermined.

The inherent difficulties present when a lawyer is both counsel and witness are recognized by Ethical Consideration 5-9 of the American Bar Association Code of Professional Responsibility, which states that "opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case." Once a jury sees an attorney take an oath on

the witness stand, it may accord testimonial weight to that which he has argued, *cf. MacArthur v. Bank of New York*, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981), or it may place undue weight on the testimony of an officer of the court. *Id.* While EC 5-9 contemplates testimony by an attorney on behalf of his client, the same concerns are present when lead defense counsel is called to testify on behalf of a defendant not his client.

We do not mean to suggest that an attorney in a multiple-defendant case may never testify on behalf of his client's co-defendant. *See United States v. Reeder*, 614 F.2d 1179, 1186 (8th Cir. 1986). The propriety of such testimony is left to the discretion of the trial court.

Here, the trial court was in the best position to observe Simels' performance before the jury "in his vigorous and lead role as defense counsel." The court carefully considered the nature of Simels' proposed testimony and its critical importance to the defense of Arrington and Wayne Davis. The court's finding that there was manifest necessity to declare mistrials as to Arrington and Davis because the jury would be unable to "judge [Simels'] credibility as a witness independently of their view of his activities as a lawyer," was a proper exercise of the court's discretion.

B. *Brooks Davis.*

1. Admissibility

Brooks Davis contends that the district court erred in ruling Harper's testimony admissible, that the disqualification of Simels thus was unnecessary, and consequently that the declaration of a mistrial was not a manifest necessity. The government intended to call Harper to testify about his involvement in drug transactions and the Diggins shooting, as well as the threat allegedly made by

Simels at the MCC. Evidence of the threat was offered to show consciousness of guilt and the existence of the conspiracy. In the district court, and on this appeal, Brooks Davis' main objection to Harper's testimony is not based on "conventional evidentiary grounds." Rather, he contends that error lies in the failure of the district court to adhere to procedures which he claims were established by this Court to govern the admissibility of evidence that tends to implicate counsel.

Specifically, Brooks Davis contends that our holdings in *United States v. Valencia*, 826 F.2d 169 (2d Cir. 1987); *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984); and *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984), require that before an attorney's statement may be used against his client in a criminal trial, the government must prove, by a preponderance of the evidence at a special hearing, that the statement was clearly made, that an innocent explanation does not exist, and that the statement is the equivalent of a testimonial statement of the defendant. Furthermore, defendant argues that the district court then must balance the government's need to introduce the evidence against the defendant's interest in retaining his attorney. We, however, agree with the district court's holding that the cited cases "in no way support any argument for holding a special hearing or excluding Harper's testimony."

Of the cases relied on by Brooks Davis, *Cunningham* is most closely analogous to the instant case in that it concerned the admissibility of evidence tending to implicate defense counsel in a scheme to conceal evidence. At issue in *Cunningham* was the location of certain envelopes. 672 F.2d at 1067-68. The government sought to introduce the testimony of a witness who claimed that defendant's coun-

sel had told her that he, counsel, was responsible for the envelopes and "the envelopes were safe." *Id.* at 1068. "On the premise that [this] testimony might be admissible at trial, and that if it were, [counsel] ought to be a witness," the district court disqualified counsel pursuant to Rule 5-102(A) of the Disciplinary Rules of the American Bar Association Code of Professional Responsibility ("Disciplinary Rules"). *Id.* at 1070. On appeal, we noted that "the question of admissibility ha[d] not definitely been decided," and under that circumstance, the defendant's "Sixth Amendment right to be represented by counsel of his own choice is too important to be denied on the basis of a mere, though substantial, possibility." *Id.* at 1075. Consequently, we vacated the disqualification order, and remanded the case to the district court for a determination of whether the evidence implicating counsel was admissible.

Contrary to Brooks Davis' interpretation, we did not instruct the *Cunningham* district court to determine the admissibility of the disputed testimony by any mode of analysis other than application of the Federal Rules of Evidence. The "balancing task" that we referred to in *Cunningham* is not, as defendant contends, part of the determination of admissibility. Rather, once it has been determined that evidence implicating counsel is admissible, a court must then "balance the defendant's constitutional right [to retain counsel of choice] against the need to preserve the highest ethical standards of professional responsibility." *Id.* at 1070. The error in *Cunningham* was that we were asked to engage in this balancing at a time when it had yet to be determined that the evidence which made the balancing necessary was admissible.

In *McKeon*, we considered the evidentiary use against a criminal defendant of his counsel's argument to a jury in

an earlier proceeding. We began by observing the general proposition that " '[s]tatements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney.' " *McKeon*, 738 F.2d at 30 (quoting *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981), *cert. denied*, 461 U.S. 913 (1983)). We recognized, however, that when the proffered statements consist of *prior jury argument*, policy considerations dictate that the statements not be subjected "to the more expansive practices sometimes permitted under the rule allowing use of admissions by a party-opponent." *Id.* at 31. Thus, in order to avoid "trenching upon" those policies, *see id.* at 32-33, we established procedures to circumscribe the use of prior jury argument. *See id.* at 33. Contrary to defendant's assertion that these procedures apply to the use of all statements by defense counsel, we clearly stated in *McKeon* that we were "circumscrib[ing] the evidentiary use of *prior jury argument*." *Id.* (emphasis added); *see id.* at 32.

Finally, in *Valencia*, we affirmed the district court's refusal to admit, under Fed. R. Evid. 801(d)(2)(D), statements made to the prosecuting attorney by defense counsel. In reaching this result, we noted that "the trial judge must be accorded considerable discretion in determining the application of Rule 801(d)(2) to statements of an attorney offered by the prosecutor against a criminal defendant." *Valencia*, 826 F.2d at 173. While we cautioned against "the routine use of attorney statements against a criminal defendant," *id.* at 172, we analyzed the disputed statements under Rule 801(d)(2), and not under special procedures that the defendant contends were established by *Cunningham* and *McKeon*.

Accordingly, we find no support for Brooks Davis' contention that there are special procedures to be followed, or

balancings to be performed as a prerequisite to the evidentiary use of a defendant's counsel's out-of-court statements. We further find no reason for adopting such measures now. Defendant predicts that there will be "virtually automatic disqualification [of counsel] . . . any time a person is willing to testify that defense counsel threatened him," and thus, vigorous and legitimate representation of clients will be deterred. This problem, however, does not appear to have materialized in the almost seven years since *Cunningham* was decided. Safeguards already exist in that trial courts are equipped to exclude the irrelevant and prejudicial, and are accorded "considerable discretion" in the application of Rule 801(d)(2) to attorney's statements. *Valencia*, 826 F.2d at 173. Moreover, conditioning the admissibility of a statement by counsel on the defendant's interest in retaining counsel would produce the anomalous result of admitting statements made by a co-conspirator who had recently become defendant's counsel, but not admitting the statements if the co-conspirator had long been defendant's counsel. *Cf. Cunningham*, 672 F.2d at 1070-71 (interest in retaining counsel is "particularly strong" where counsel represented defendant for over six years and in numerous proceedings).

Turning to the facts of the case before us, we note that this is not a routine case. Harper's disputed testimony implicating Simels in a scheme to keep witnesses from testifying was offered after two government witnesses had already recanted, and a third had been shot. Simels went to see Harper alone at the MCC. Although the affidavit he procured contains Harper's disavowal of knowledge of or involvement with any criminal activity of the defendants, Harper pleaded guilty to participating in the defendants' narcotics conspiracy and to conspiring to commit murder

in aid of racketeering—charges carrying possible maximum sentences of twenty and ten years respectively. The district court found Harper to be "quite a credible witness." Judge Griesa carefully considered the nature of Harper's proposed testimony, and all that would occur as a result of its admission. Under the circumstances, we cannot say that it was an abuse of discretion to rule Harper's testimony fully admissible against Brooks Davis.

2. Proffered waivers.

Once the decision was made to admit Harper's testimony, it was inevitable that Simels would become a witness—either sworn or unsworn—in the proceedings, thus requiring the disqualification of Simels as Brooks Davis' counsel under Disciplinary Rule 5-102(A). Brooks Davis contends, however, that the disqualification of Simels, and consequently the declaration of a mistrial, could have been avoided by a series of proposed waivers. Specifically, defendant argues that he has the right, under the sixth amendment, to retain Simels as counsel and to waive any direct challenge to Harper's testimony in order to prevent Simels from becoming a witness. Defendant further argues that the district court abused its discretion in declining to honor his waiver of conflict-free counsel. We find these contentions to be without merit.

We have recognized that the right to retain counsel of choice is "a right of constitutional dimension." *United States v. Wisniewski*, 478 F.2d 274, 285 (2d Cir. 1973). The right, however, is not absolute. As the Supreme Court has recently stated, "the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he pre-

fers." *Wheat v. United States*, 108 S. Ct. 1692, 1697 (1988).

Relying on *Cunningham* and *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), defendant asserts that he is entitled to make a knowing and intelligent waiver of the right to be represented by conflict-free counsel, and thus retain Simels as counsel. Defendant's argument, however, evinces little appreciation for the nature of the conflict enveloping Simels. The conflict here is "not the more usual one of multiple representation." *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). Rather, counsel has been placed in the position of having to worry about allegations of his own misconduct. As we noted in *Cancilla*, "[w]hat could be more of a conflict than a concern over getting oneself into trouble with criminal law enforcement authorities?" *Id.*

In the district court's view,

> Mr. Simels . . . has exposed himself to charges of the greatest misconduct. He has a personal stake in the matter. Whether he is ever indicted for a criminal violation, I don't know. But he certainly has a problem which will eventually go before the grievance committee of this court as to whether he is to be disciplined in this court. And in any event, he is and he knows it and it has been stated by the court, he is now accused of very serious misconduct, potentially criminal in nature.

Thus, if the court had accepted Brooks Davis' proffered waiver of conflict-free counsel, he would have been represented by counsel encumbered with a strong incentive to conduct the trial in a manner that would minimize counsel's own exposure. This conflict would continue to exist even if all references to Simels were redacted from

Harper's testimony, or if Brooks Davis waived the presentation of any direct rebuttal to Harper's testimony.

The extent to which a district court may override a defendant's waiver of his attorney's conflict of interest has recently been explored by the Supreme Court. In *Wheat*, the Court recognized that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." 108 S. Ct. at 1697. To this end, a district court "should not be required to tolerate an inadequate representation of a defendant." *Id.* at 1698 (quoting *United States v. Dolan*, 570 F.2d 1177, 1184 (3d Cir. 1978)). Consequently, "where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver." *Id.*

The testimony of Harper was very powerful evidence against Brooks Davis. As the district court explained, by waiving the right to call Simels, "Brooks Davis would be foregoing the presentation of the most relevant evidence on the point," evidence that would "be of great assistance to Brooks Davis if it were true." Furthermore, this waiver was offered by Brooks Davis in order to retain the representation of an attorney saddled with a serious conflict of interest. While the prospect of allowing someone to defend himself with one hand tied behind his back may present an interesting spectacle in a wrestling ring, the court's "institutional interest in the rendition of just verdicts in criminal cases," *id.*, and the proper administration of justice require that a criminal defendant not be so encumbered.

Since we agree with the district court's decision declining Brooks Davis' proffered waiver, we find the disqualifi-

cation of Simels to have been proper, and thus the declaration of a mistrial as to Brooks Davis to have been a manifest necessity.

C. *Mary Davis.*

Mary Davis contends that even after mistrials were declared as to the other defendants, she should have been allowed to proceed to trial alone. She argues that Harper's testimony, which would have drawn Simels into the case, was inadmissible against her, and thus there was no manifest necessity to declare a mistrial. We disagree.

Under Fed. R. Evid. 801(d)(2)(E), statements offered against a party, and made by a co-conspirator of that party in the course of and in furtherance of a conspiracy, are admissible against that party. *See, e.g., United States v. Persico*, 832 F.2d 705, 715 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1995 (1988). An admissible statement of a co-conspirator is admissible against all other members of the conspiracy. Membership in a conspiracy may be shown by a quantum of proof " 'lower than the standard of evidence sufficient to submit a charge of conspiracy to the jury.' " *United States v. Ginsberg*, 758 F.2d 823, 828 (2d Cir. 1985) (quoting *United States v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir.), *cert. denied*, 454 U.S. 839 (1981)).

Mary Davis argues that evidence of the Simels' threat is not admissible against her because it was not made in the course of the underlying conspiracy. Generally, a statement is not made in the course of a conspiracy when it is made after the main objective of the conspiracy has been accomplished. *See Krulewitch v. United States*, 336 U.S. 440 (1949). However, even where particular crimes have already been committed, "the conspiracy does not necessarily end; it continues until its aim has been achieved, it

has been abandoned, or otherwise terminated." *United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978). The fact that some of the conspirators have been indicted and incarcerated does not inexorably lead to the conclusion that the conspiracy has been terminated. *See Persico*, 832 F.2d at 715-16 (conspiracy continued after incarceration of some members).

Here, the defendants were not charged with conspiracy to bring about a single illegal result which has already been accomplished. Rather, they stand charged with conducting a large-scale narcotics distribution organization. The plot to silence witnesses furthers the goals of the conspiracy in that the distribution of narcotics would be facilitated by the acquittal of all the defendants. We agree with the district court's conclusion that Harper's testimony is fully admissible against Mary Davis.

Once the testimony implicating Simels is admitted, Simels would become a sworn or unsworn witness, regardless of whether his client remained in the trial. Thus, the problem confronting Mary Davis is the same as faced by co-defendants Arrington and Wayne Davis. Because the district court found that the jury would be unable to "judge [Simels'] credibility as a witness independently of their view of his activities as a lawyer," manifest necessity existed to declare a mistrial as to Mary Davis as well.

CONCLUSION

We have examined the defendants' remaining claims and find them to be without merit. In view of the foregoing, the order of the district court is affirmed as to all defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

87 Cr. 853 (TPG)

— against — :

OPINION

BROOKS GREGORY DAVIS, et al., :

Defendants. :

On April 11, 1988 Brooks Davis, Wayne Davis, Claddis Arrington and Mary Ferguson went on trial on narcotics and related charges. On April 28 a mistrial was declared as to Wayne Davis and Arrington. On May 2 a mistrial was declared as to Brooks Davis and Ferguson. The May 2 ruling included an order of the court that the attorney of Brooks Davis, Robert Simels, would be disqualified from further representation of Brooks Davis. Subsequently the court qualified the latter order to permit Simels to participate in the representation of Brooks Davis in connection with the motion now before the court and any appeal.

The court has announced its intention to hold a retrial of the four defendants. The motion now before the court is one to dismiss the charges proposed to be retried on the ground that such a retrial would violate defendants' right not to be subjected to double jeopardy. The motions are denied.

A statement of the relevant facts and the basic legal considerations is contained in the trial record of May 2, 1988 (Tr. 2096-2127), attached as an appendix to this opinion. Only a brief summary will be set forth here.

On April 11, the first day of the trial, the Government apprised the court and the defense attorneys that a potential Government witness (not then identified to the court or to the defense) had informed the Government of the shooting and attempted murder of another potential Government witness, Isaac Diggins. The Government's information indicated that

Arrington was directly responsible for the shooting and that other defendants were probably also involved, at least in instigating the shooting. Brooks Davis at this time was incarcerated at the MCC, having been remanded earlier. Arrington, Wayne Davis and Ferguson were free on bail. Upon application of the Government, the court revoked the bail of the latter three defendants and remanded them. On April 22, during the course of the trial, the Government addressed a letter to the court about further developments. The Government contended that the person who had given information about the Diggins shooting, now identified as Aaron Harper, had provided further information to the Government, implicting the attorney Simels in an ongoing plot to prevent Government witnesses from testifying. The Government contended that Harper was prepared to testify that Brooks Davis, Wayne Davis and Arrington had confronted Harper while they were all in custody, that Brooks Davis, in the presence of the other two, had told Harper that an attorney would visit him with a paper for him to sign, that following this meeting Simels had visited Harper at the MCC, had made a threat to Harper to the effect that his family would be in danger if he testified for the Government, and told Harper that a statement would be given to Harper to sign. The government's letter further stated that Harper would testify that another attorney, saying he was sent by Simels, had brought a statement which Harper signed without reading. The statement turned out to be an affidavit which disavowed any assertions about culpable conduct by any of the defendants regarding the shooting of Diggins, and which also denied previous assertions, made by Harper, about drug dealing with defendants. The Government stated that the attorney who took the affidavit to Harper was Michael Gavenchak, who was associated with counsel for Wayne Davis, Judd Burstein.

The Government announced to the court that it intended to call Harper to testify about the Simels incident, and also about other matters, including the Diggins shooting. There followed several days of intensive discussions between the court and counsel as to whether these circumstances required a mistrial or whether some device could be arrived at which would

preserve the trial. In the midst of these discussions, a hearing was held at which Harper, Simels, Gavenchak, and one of the Government lawyers testified. Harper indicated that he would indeed testify regarding the Simels incident substantially as the Government had described. Moreover, his testimony at the hearing, if true, would inevitably lead to the conclusion that Simels had drafted a false affidavit which Harper signed under pressure and without knowing its contents. Simels, in his testimony at the hearing, admitted going to the MCC to visit Harper, but denied making any threat to Harper and asserted that the affidavit was based on what Harper told him. Gavenchak testified that he took the affidavit to Harper as an accommodation to Simels and that Harper appeared to read it before signing.

The court determined that the Government was entitled to introduce evidence of the Simels incident. In response, all defendants indicated that they would wish to defend against this evidence and the accusation that they, or some of them, were responsible for having Simels convey a threat to Harper and procure a false affidavit. Defendants Wayne Davis and Arrington took the position that they would wish to call Simels as a witness and could conceive of no way to defend on the Simels matter without his testimony. Consequently, a mistrial was declared as to Wayne Davis and Arrington on April 28, on the ground that Simels, having acted as trial attorney for Brook Davis, could not now, in the same trial, assume the role of witness on accusations about his conduct.

Brooks Davis and Ferguson suggested certain devices by which they proposed to present their defense regarding the Simels matter without having Simels testify personally and without having Simels make arguments on the point personally. They would rely on certain other evidence, and rely on having the attorney for Ferguson make the arguments. For reasons set forth in the court's statement of May 2, none of these devices was workable and a mistrial was declared as to Brooks Davis and Ferguson on that date.

The court found that the circumstances created a "manifest necessity" for declaring a mistrial as to all four defendants. *See*

United States v. Ruggiero, 846 F.2d 117, 123 (2d Cir. 1988). The principal cases which the court relied on, and still relies on, are *United States v. Kwang Fu Peng*, 766 F.2d 82 (2d Cir. 1985) and *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982).

In their present motions all defendants argue that there was no manifest necessity for declaring the mistrial. In connection with these arguments, the court now rests mainly upon the statement made on the record on May 2, 1988 at the time the mistrial was declared as to Brooks Davis and Ferguson. The facts recited in that statement, and the issues discussed, largely cover the situation not only of those two defendants, but of Wayne Davis and Arrington also.

However, certain additional comments should be made regarding Wayne Davis and Arrington to supplement what was stated on the trial record.

The testimony of Harper, accusing Simels of conveying a threat and procuring a false affidavit, was clearly admissible against Wayne Davis and Arrington. As already indicated, Harper was prepared to testify, among other things, that Wayne Davis, Arrington and Brooks Davis confronted him while they were all in custody, and that Brooks Davis, in the presence of the other two, told him that a lawyer would be visiting Harper with a paper for him to sign. Harper's hearing testimony was to the effect that Brooks Davis explicitly told Harper that the paper would say that Harper would not testify for the Government. This led to the Simels visit, the alleged threat, and the procurement of the allegedly false affidavit. This evidence would be admissible against Wayne Davis and Arrington on the theory that they joined with Brooks Davis in a plan to use Simels to prevent the testimony of Harper.

In light of the above circumstances, the attorneys for Wayne Davis and Arrington, after consultation with the clients, announced that they would need to call Simels as a witness. They could, of course, not be denied the right to do so.

Under the controlling case law, Simels could not testify as a witness in a case in which he was acting as attorney. As a

theoretical matter, one might conceive of the possibility of declaring a mistrial as to Brooks Davis and Ferguson and continuing the trial as to Wayne Davis and Arrington. However, such a procedure would be improper in the extreme. As the court noted in its May 2 statement, Simels was the attorney taking the most active role for the defense. The cross-examination of the Government witnesses had been conducted very largely by Simels. It is difficult to overestimate the confusion which would inevitably be caused in the minds of the jurors to tell them that they were no longer to be trying the case of Brooks Davis and Ferguson, but that nevertheless they would continue to try the case of Wayne Davis and Arrington, and that they would be hearing from Simels as a witness on accusations about his own conduct. There would be no way for the jury to judge his credibility as a witness independently of their view of his activities as a lawyer. There would be no way for the jury to suddenly divorce the Brooks Davis/Ferguson case from the Wayne Davis/Arrington case. It was manifestly necessary to declare a mistrial as to Wayne Davis and Arrington.

Certain other points need to be discussed which were not specifically addressed in the May 2, 1988 statement.

I.

Wayne Davis contends that, prior to declaring a mistrial as to him, the court should have held what he terms a "*Cancilla* hearing," and that the court did not do so. This contention is entirely without merit, but requires brief discussion.

Shortly after the granting of the mistrial, the then attorney for Wayne Davis, Judd Burstein, requested to be relieved and to be replaced by another attorney. There was no objection by Wayne Davis or by anyone else, and Burstein was promptly replaced by Richard Levitt. It is Levitt who is presenting the current motion on behalf of Wayne Davis.

Wayne Davis argues, through his new attorney, that Burstein had a personal interest in precipitating a mistrial. Wayne Davis contends 1) that it was not in the interest of Wayne Davis to

demand that Simels be called and thus risk a mistrial; and 2) that Burstein took the action he did in this regard in order to force a mistrial so that he could extricate himself from the case.

The first of these points is wholly unrealistic. At the time the mistrial was declared, the Government had presented a strong case, although certain witnesses had been subjected to vigorous cross-examination and questions about their credibility existed for determination by the jury. Evidence about a plan to kill or otherwise silence witnesses, commencing before the trial and culminating in the Simels incident, was destined to be an important part of the Government's case. It should be noted that Harper had advised the Government of a telephone call to him from Wayne Davis some time prior to the Diggins shooting in which Wayne Davis had spoken of a desire to eliminate witnesses. At the hearing, Harper recalled being telephoned by Wayne Davis but stated that he could not recall what was said. It appeared likely, nevertheless, that at trial the Government could use its interview notes to refresh Harper's recollection on the contents of the Wayne Davis telephone conversation.

In any event, as far as the Simels incident was concerned, Harper testified at the hearing that he was confronted by Wayne Davis, as well as Arrington and Brooks Davis, and that in this conversation, in the presence of Wayne Davis, Brooks Davis said that an attorney would visit Harper to have Harper sign a statement that he would not testify for the Government.

Under the circumstances, an attorney for Wayne Davis would be derelict if he failed to use every possible means to refute the testimony of Harper and to rebut the allegation that Wayne Davis was an accomplice in a plot to silence Government witnesses, including Harper. Not surprisingly, Wayne Davis's attorney, Burstein, took the position that he would, among other things, call Simels as a witness.

It is important to note that the demand to call Simels was made not only by Burstein on behalf of Wayne Davis, but also by Arrington's attorney, Eugene Bogan. There is not the slightest reason to doubt that these attorneys were acting entirely in the

best interests of their clients. They obviously weighed the short-term difficulties of a mistrial followed by a retrial, against the need to use every available means to defend against most serious narcotics charges.

As to the second point made by Wayne Davis, suggesting that Burstein acted as he did in order to extricate himself from the case, this is baseless speculation. The court finds that Burstein's decision to demand the right to call Simels was made in Wayne Davis's best interests and without regard to Burstein's personal interests.

In connection with this second point, Wayne Davis cites *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984). This is one of several Second Circuit cases dealing with possible conflicts of interest by attorneys for defendants in criminal cases. *See also*, *United States v. Iorizzo*, 786 F.2d 52 (2d Cir. 1986); *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982). These cases deal with situations where an attorney attempts to represent a defendant in the face of a rather clear-cut conflict or potential conflict, such as the representation of two defendants at the same time, having a personal difficulty created by the attorney's own criminal conduct, etc. The Court of Appeals has made it clear that when these problems surface, the attorney must be disqualified, or there must at least be special procedures, such as inquiries of the client, reference to independent counsel or other appropriate protective measures. What is necessary in a given case obviously depends upon the particular circumstances.

In the present case, questions relating to the proper protection of the interests of defendants were explored exhaustively with the full participation of both the attorneys and the clients. The most acute problem arose in the case of Brooks Davis because his attorney, Simels, was attempting to continue to represent Brooks Davis and was urging that the trial proceed with the use of one device or another which would allegedly make his testimony unnecessary. After lengthy discussions and after the court had urged Brooks Davis to consult with independent counsel (which he did not do), the court finally determined that the proper administration of justice and the protection

of Brooks Davis's own interests demanded that a mistrial be declared and Simels be disqualified.

To return to the question of Wayne Davis, a problem of the same degree was simply not presented. His attorney Burstein was advising his client, and was taking a position on behalf of his client, that was clearly in his client's best interests, as already described. If Burstein had sought to avoid a mistrial by failing to request the right to call Simels as a witness, *this* would have been a suspicious circumstance. Indeed, it would have been so obviously contrary to the interests of Wayne Davis that it is difficult to believe that the court would have ever approved having the trial go forward with Wayne Davis deprived of the testimony of Simels.

A comment should be made about Gavenchak, the attorney who took the affidavit to Harper for signature. Gavenchak testified that he acted solely as a courier and notary and had no knowledge of the circumstances giving rise to the affidavit. He took the affidavit to Harper as an accommodation to Simels.

Aside from the above, Gavenchak was assisting Burstein, Wayne Davis's attorney, in some fashion in connection with the trial of this case. However, he played no role in court. He was present at the counsel table briefly on one or two occasions, but made no presentation to the jury of any kind and did no questioning of witnesses.

Because of Gavenchak's role in taking the affidavit to Harper, it is likely that his testimony will be required at the trial.

The need for Gavenchak's testimony was not regarded by the court as a weighty factor in declaring the mistrial. The need for Simels's testimony was the overriding consideration. However, it must be said that Gavenchak's role in the Simels incident, and his connection with Burstein, might have presented some difficulty if the trial had continued without a mistrial. This potential problem has been eliminated by the declaration of the mistrial.

II.

Wayne Davis and Arrington contend that the problem giving rise to the mistrial occurred through no fault of theirs, so that they should not be required to undergo a retrial.

As already indicated, if the testimony of Harper is believed, this could well indicate that Wayne Davis and Arrington shared a joint responsibility with Brooks Davis for having Simels approach Harper in the MCC.

However, a finding on this question is not really germane to the issue of the validity of the mistrial and the propriety of a retrial. The standard for declaring a mistrial to be followed by a retrial is "manifest necessity." Such manifest necessity can exist for a variety of reasons wholly unconnected with the fault of a defendant. *See United States v. Ruggiero*, 846 F.2d 117, 124-25 (2d Cir. 1988).

III.

Defendants argue that the Government is somehow guilty of misconduct and that this circumstance bars a retrial. The argument is, in essence, that the Government knew, or should have known, of the Simels problem some days earlier than the time it notified the court of this situation on April 22. Indeed, defendants at least imply that the Government should have raised the problem before jeopardy attached. It is further argued that the Government raised the issue when it did because its case was going badly and it was desirous of avoiding completion of the case with the available evidence.

This line of argument is entirely without merit. Simels visited Harper the morning of April 12 and the affidavit was signed the same day. The defense lawyers advised the court on April 12 that an affidavit had been obtained from Harper denying what he had previously told the Government. The circumstances of procuring the affidavit were not disclosed. Jury selection was completed that day and the jury was sworn in at the commencement of the following day, April 13.

The Government has provided a chronology of its activites. Following receipt of the information about the Harper affidavit, the Government attorneys attempted to communicate with the attorney for Harper, Wesley Serra, to ascertain the circumstances surrounding the affidavit. Late in the day Serra spoke to a Government attorney and stated that he knew nothing about any such affidavit and would check with his client. On the afternoon of April 12 the Government was advised by a DEA agent that Harper's aunt reported that two defense lawyers had visited Harper earlier in the day. Between April 13 and April 15 the Government negotiated with Serra the terms upon which Harper would be made available for interview by the Government. The first occasion on which the Government was able to speak with Harper was either April 18 or April 19. It was then that the Government learned Harper's account of the Simels visit of April 12 and the signing of the affidavit.

The Government then took certain actions to verify Harper's account, considered the legal implications, and wrote the letter to the court of April 22.

The Government was not dilatory in its inquiry or in its disclosure of the problem to the court. It was not under any duty to raise the issue prior to the attachment of jeopardy. The Government did not know the necessary facts as of that time. Moreover, there is not the slightest basis for the claim that the Government raised the Simels incident as a device to deliberately abort the trial.

IV.

Brooks Davis contends that Harper's testimony would be inadmissible under *United States v. Valencia*, 826 F.2d 169 (2d Cir. 1987); *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984) and *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982). They further contend that under these cases a special hearing should have been held prior to deciding upon the admissibility of Harper's testimony. These cases in no way support any argument for holding a special hearing or excluding Harper's testimony. In any event, this point was not raised in the

discussions leading up to the declaration of the mistrial, nor was any special hearing requested at that time. It is too late to complain now about not having such a hearing.

CONCLUSION

For the foregoing reasons, defendants' motions to prevent the retrial and to dismiss the charges proposed to be retried are denied.

SO ORDERED.

Dated: New York, New York
August 12, 1988

/s/ Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

APPENDIX

Opinion of August 12, 1988

take it that Mr. Davis does seek to defend himself against the accusations which I have just summarized.

MR. SIMELS: He said, your Honor, if the court wanted to permit him the special counsel and permitted cross-examination, he certainly would want to avail himself of that. If the court decided that you prefer for me just not to cross examine Harper, he would be willing to live with that also.

The answer is that –

THE COURT: The thing is, Mr. Simels, I'm asking a rather outlandish question. I'm really saying basically, are you – look, do you contest a serious allegation here? I assume he does, and he would want to do it in whatever way was appropriate.

Is that incorrect? The thing is, I take it he is not prepared to stipulate to the accusations made by the government, which I just –

MR. SIMELS: That is correct.

THE COURT: Sure. Okay.

We have to come to the point of resolving this very difficult procedural dilemma. The matter has been before us since –

MR. SIMELS: The 22nd, when the government wrote the letter.

MR. McCARTHY: Two Fridays ago.

THE COURT: The government's letter of April 22nd is what I need.

The government raised this problem April 22nd, and we have had intensive discussions – April 22nd was a Friday, on which we were not holding court.

We have had intensive discussions of this matter during the succeeding week. We had a hearing out of the presence of the

jury on April 27th, at which Mr. Harper was called as a witness and at which Mr. Simels and Mr. Gavenchak testified.

We have had briefing on the law, and we have declared a mistrial as to two of the defendants in the course of these proceedings last week, that is, Wayne Davis and Claddis Arrington.

Now we have an application by the government to have a mistrial declared as to Brooks Davis, and have Mr. Simels disqualified from further representation of Brooks Davis.

With the greatest reluctance, I see no alternative but to grant the government's motion in all respects.

I will summarize the grounds for my ruling, although they are really contained in earlier discussions, but to pull it together.

In the first place, I want to note that I have examined the case law, and in the statement I am now making I will not refer to all the cases, but it seems to me clear that the Court of Appeals cases place a duty and a discretion on the court to take appropriate action in a situation like this.

Not surprisingly, no case exactly in point has been cited. These cases arise in circumstances that are inevitably unusual, and our case is unusual and has no direct, exact precedent, but the Court of Appeals decisions provide guidance, and I am attempting conscientiously to act within the guidance, as I understand it exists, in those controlling decisions.

We have had injected into the case a very serious question regarding the conduct of Brooks Davis' lawyer, Mr. Simels, and that question goes to an important issue on which the conviction or acquittal of Brooks Davis could easily rest, and I think to put it in perspective, we have to go back a bit.

The government has come forward with evidence and proffers of proof to the effect that these four defendants planned and took steps to carry out plans to prevent certain witnesses

from testifying at this trial, the evidence and proffers of proof indicating that this is an extraordinary, abnormal, and dangerous situation.

It started, the indications to the court started with events in March involving the alleged recantations of two persons who had pleaded guilty and who had agreed to cooperate with the government, namely, a person named Mitchell and a person named Greene. They were defendants in this case who had pleaded guilty and were cooperating with the government.

In March they went to defense lawyers and recanted. This was basically on the eve of trial, and the circumstances were extremely suspicious, to say the least at that time, but based on the information given to me there was no particular reason to believe that the lawyers to whom the recantations were made were responsible for these events. However, three of the defendants were out on bail, that is, Wayne Davis, Claddis Arrington, and Mary Davis, and certainly there was an issue which would have been presented to the mind of anyone in my position as to whether this was not the product of some influence or other improper activity on the part of the defendants here.

However, a more ominous development occurred right before the trial. The trial started April 11. Before the selection of the jury had begun, and I believe it was April 11, the morning of April 11, although there may have been a letter delivered to the court, but in any event, the court was apprised at this time of the shooting of a witness, a prospective witness, the night of April 9. The prospective witness was Isaac Diggins. The circumstances of the shooting led the government to request revocation of bail as to the three defendants out on bail, that is, Wayne Davis, Claddis Arrington, and Mary Davis.

After proceedings before the court, the court did in fact grant the government's application and remanded these three defendants. That has been the subject of Court of Appeals proceedings as to Wayne Davis and Mary Davis, and I will not get into that because that relates particularly to bail, and what I'm focusing on now is not the question of bail so much as the question of activities relating to obstruction of justice.

The government apprised the court at the outset of the trial that it had evidence from one Aaron Harper —

MR. SIMELS: I don't think that's correct, your Honor. I don't think Aaron Harper's name was ever mentioned at that time.

MR. McCARTHY: But on April 12 it was.

MR. RICHMAN: He was referred to as CI. Confidential informant.

THE COURT: I don't think that is terribly essential whether the government identified the person or not, but the government represented that it had evidence from an informant, who at some point was certainly identified as Aaron Harper, to the effect that Harper had been approached by Claddis Arrington the night of April 3 and that Arrington had expressed the wish to do away with one or more witnesses, and had procured Harper to assist in having Isaac Diggins go to a place where Diggins was later shot.

THE COURT: Clearly, there was an intention to kill Diggins, although fortunately Diggins did not die. He apparently, however, was shot and is in serious condition.

At that time, the focus of the court was upon the question of bail. There was before the court these events which I have mentioned, namely, the alleged recantations of Mitchell and Greene, and the shooting of Diggins, and this was the basis for a discussion of the bail status of the three defendants out on bail.

However, at this point, there was no apparent issue about the conduct of any of the lawyers in the case; at least, there was no indication of any conduct which would lead to a conflict of interest or make a mistrial necessary or anything like that.

I did order the remand of the three defendants out on bail; we proceeded with the selection of the jury; and that process was completed by the end of the day April 12.

Opening statements and presentation of the evidence started on April 12. We had court the 12th and the 14th. We did not have court in this case on the 15th. We resumed the 18th, and had trial sessions through the 21st. We did not have a trial session on the 22nd.

On the 22nd the government addressed a letter to the court which raises the issues now involved in the problem of whether to declare a mistrial.

The government's letter of April 22 referred again to recantations of Mitchell and Greene, referred again to the shooting of Diggins and the information from Harper implicating Arrington in that shooting. The letter also referred to information from Harper to the effect that some time prior to the Diggins shooting, he had received a telephone call from Wayne Davis in which Wayne Davis discussed various potential witnesses in this case, including Diggins, Greene, Mitchell, and Charles Williams, and told Harper that he wanted Harper's assistance in locating and murdering these persons or at least some of them.

MR. SIMELS: We are talking now about the government's letter as against what Harper testified to?

THE COURT: Right.

The letter went on to state that the government had received information to the effect that Harper, who had been taken into federal custody, had been approached by Mr. Simels, the attorney for Brooks Davis. The letter stated that on April 11 Harper came in contact at the MCC or in a courthouse holding pen with Brooks Davis, Wayne Davis, and Claddis Arrington. The letter stated that Brooks Davis, Wayne Davis, and Arrington surrounded Harper, asked him numerous questions about what he was telling the government, after which Brooks Davis told him, Harper, that a lawyer would be coming to see him the following day.

According to the government's letter of April 22, the following morning Mr. Simels came to the MCC and visited Harper.

Simels and Harper were alone. According to the letter, Simels told Harper that he should not trust his court-appointed lawyer. According to the letter, Simels made a threat to Harper in the form of telling Harper that he would be better off not allowing anyone to make him testify against his friends when his family members were still at risk on the street.

According to the letter, Simels told Harper that a statement would be sent up for him, Harper, to sign.

The letter goes on to say that later in the day an attorney by the name of Michael Gavenchak came to visit Harper representing himself to be an associate of Mr. Simels. He presented Harper with a typewritten statement which Harper signed without reading. No one was present at this session except Gavenchak and Harper.

The government's letter of April 22 was answered by letters from Mr. Simels denying the version of the events stated in the government's letter. We also received a letter from Judd Burstein, who is the attorney for Wayne Davis. The record shows that Mr. Gavenchak actually is connected in some way with Mr. Burstein and is not an associate of Mr. Simels.

Mr. Burstein's letter indicated that he had asked Gavenchak to take the document to Harper. Mr. Burstein's respresentation in his letter was that he did not know of anything wrong about any of these transactions, and that Gavenchak was simply acting as a messenger.

The problem was obviously presented to the court as to whether one or more attorneys would have to be disqualified, and as to whether a mistrial would have to be granted as to one or more of the defendants.

The accusation against the defendants regarding plans to murder and suborn witnesses was obviously a matter of the greatest gravity. The accusation against Mr. Simels that he went to Harper at Brooks Davis's request and threatened Harper and

and obtained a false affidavit from Harper, this in itself was an allegation of the most serious nature.

The obvious primary problem presented was how to handle a situation where Mr. Simels might need to be a witness to present a version of these events favorable to himself and his client so that there could be a defense against these serious allegations by the government.

This problem was compounded, if it needed to be compounded, by the fact that Mr. Simels had up to this point taken the leading defense role in the trial. That is, he had invariably been first in cross examining witnesses and had engaged in lengthy cross examinations, leaving very little for the other defense lawyers to do by way of cross examination.

Consequently, we were faced with a situation where the lead lawyer for the defendants was a potential witness in the case.

It was necessary at this point to determine whether Harper would really testify in a way to implicate and accuse Mr. Simels. Consequenty, we had a brief hearing on April 27 at the beginning of the day outside of the presence of the jury.

This hearing did not involve a thorough exploration of all of the issues in connection with either the alleged plot to destroy witnesses and suborn testimony, or even the portion of that problem relating to the visit by Simels to Harper.

All that I wanted to do was to ascertain whether we would indeed have a problem created by testimony of Harper which implicated Simels and raised the necessity for Simels to be a witness.

Harper was called and testified that he would indeed testify at the trial to being approached by Arrington to assist in the killing of Diggins on that Saturday night, April 9. He further testified that he was picked up by the authorities and that he was

at the MCC on April 11, at which time in a holding pen he saw Wayne Davis, Brooks Davis, and Claddis Arrington. He testified that there was some conversation with them at the end of which Brooks Davis stated that he would have his lawyer come to see Harper with a piece of paper. This is at page 1621.

At page 1642 Harper testified that Brooks Davis said that he would have the lawyer come to see Harper to sign a paper that Harper would not testify against Brooks Davis.

Harper testified that the following day Mr. Simels came to see him, and that he saw Simels by himself. No one but Simels and Harper was present.

Harper testified that Simels, after some discussion, stated, "Don't let the DEA, you know, have you testify against your friends that you once knew outside on the street while your family is out there." That is at 1624.

According to Harper's testimony, Simels said that his assistant would come back with a piece of paper for Harper to sign saying that Harper would not testify against the defendants. This is at 1624 and 1625.

Finally, according to Harper, Simels said that his, Harper's, lawyer would be working with the DEA and not to trust him. That is at 1625.

Harper testified that Simels left and that a couple of hours later another lawyer came to see him who said that he was with Simels. According to Harper's testimony, this second lawyer showed Harper a paper, showed him where to sign the paper, and Harper signed.

Harper testified he glanced through the paper but did not read it. This is at 1627 and 1628.

At this hearing outside of the presence of the jury, Mr. Simels took the stand and testified in a way completely contrary to the

version presented by Harper. In substance, Simels testified that what was put in the affidavit was what Harper had told him, and according to Simels what he was doing was simply obtaining the truth from Harper and recording it in an affidavit which Harper later signed.

Gavenchak testified that, at the request of Mr. Simels, he went to the MCC, saw Harper, and gave him the affidavit. According to Gavenchak, Harper read it, appeared to understand it, and signed it.

One other witness at the hearing out of the presence of the jury was one of the Assistant United States attorneys, Andrew C. McCarthy, and he testified in accordance with the government's contentions.

In my statement thus far I have not really described very well the affidavit, but we do have an affidavit signed by Aaron Harper, sworn to before Michael Gavenchak, who is a notary public, and the date of the affidavit is April 12, 1988. The affidavit alleges that Harper did not voluntarily and truthfully tell the government about the defendants being implicated in the attempted killing of witnesses, and did not voluntarily and truthfully tell the government about drug activities in the past with the defendants here.

I think I have neglected to say that one of the things that Harper was prepared to testify to, according to the government, was drug activities with the defendants.

The affidavit ends up saying that Harper had never been involved in any illegal activities with Brooks Davis, Wayne Davis, or Mary Davis, and that it was Harper's belief that the prosecutors are trying to frame these people for something they had no involvement with.

Since the time of the hearing on April 27, we have given further consideration to the problems presented and have had further presentation of the case law and proposals about how to deal with the situation.

Incidentally, at the hearing of April 27, Harper was asked about a prior conversation on the telephone with Wayne Davis. He recalled the conversation but did not recall what was said, so at the hearing on April 27, he was not able to testify as to the threats and talk of witness killing by Wayne Davis. However, the government has a written summary that is written by an Assistant U.S. attorney of discussions with Harper in which Harper flatly described in graphic terms the conversation, and we must foresee the distinct probability that Harper's recollection will be refreshed as to this conversation when he testifies at the trial.

We come back to the subject of what Harper will testify about at the trial. I believe that Harper is certain to testify as to drug dealing with the defendants, will testify as to Wayne Davis discussing the murder of witnesses with Harper on the telephone, the discussion of Arrington with Harper the night of April 9 about the murder of Diggins.

It is also a certainty in my view that Harper will testify that he was told the night of April 11 by Brooks Davis in the company of Arrington and Wayne Davis that Brooks Davis's attorney would come to see him the next day with a statement for him to sign saying he would not testify. It is my view that Harper will also testify at the trial, at whatever trial is held henceforth, that Mr. Simels came to see him, conveyed a threat, spoke against Harper's court-assigned attorney, and prepared Harper for the fact that another attorney would be coming shortly with a statement for Harper to sign saying that he would not testify against the defendants.

It is also a certainty that Harper will testify that the other attorney came, presented the affidavit, which Harper glanced through but did not read, and then signed.

This adds up to an accusation, among other things, that as part of this extended plan to eliminate witnesses or prevent their testimony, Brooks Davis sent his lawyer, Mr. Simels, to have Harper sign a false affidavit exonerating the defendants.

It also adds up to a serious accusation that Mr. Simels threatened Harper that his family would be harmed if he would testify, and also attempted to undermine his confidence in his own lawyer.

I should also note that on Thursday, late in the afternoon, Harper pleaded guilty to two counts of an information. The first count involved violation of the narcotics laws. The second count was for conspiring to murder a witness. I observed Harper carefully and questioned him carefully in that allocution. I also observed his lawyer, Mr. Serra. I questioned Harper carefully about whether he was satisfied with his lawyer. I am convinced that Harper is most satisfied with his lawyer.

I was also impressed with the lawyer's conduct in this matter. I am also impressed with the fact that Harper has pleaded guilty to two most serious offenses, and I find it very difficult to believe that he would be doing so if this were some kind of fabrication.

All of this presents us with the most serious possible issue of a plot by the four defendants here over an extended period of time and through many devices to kill witnesses or to otherwise silence them. This is an issue which affects all the defendants. The government has in connection with a recent bail hearing made a proffer of evidence that implicates even Mary Davis in this activity, to say nothing of the three men.

As far as the problem of Mr. Simels, we have a situation where Mr. Simels has injected himself personally into the issues about this alleged serious scheme to kill witnesses and otherwise silence them. Mr. Simels, according to the Canons of Ethics, should have had someone accompany him in his visit to Harper if he made it at all. He did not do so.

The overall issue of the plot to kill and silence witnesses is extremely serious, and this of course affects the nature of the issue about Mr. Simels personally and makes it part of this most serious and grave group of issues.

Mr. Simels has become an actor in the events which go to the merits of this case. He has made himself someone who would normally be a witness as to serious events in the case. This is not an incidental or light matter. It is not merely a question of a lawyer who has interviewed a witness and then wishes to confront the witness with impeaching material. This goes far beyond that. This is a problem of a potential activity by a lawyer to suborn a witnes, prevent a witness from testifying through threat and through concoction of false affidavit.

Needless to say, neither Mr. Simels nor his client nor any of the other defendants concedes that these accusations of the government and this testimony of Harper are true. Mr. Simel's client, Brooks Davis, naturally wishes to defend himself against these accusations leveled at himself and his attorney. I must assume that Mary Davis also wishes to defend against those accusations to the extent that they might affect her case.

As far as the other two defendants, they made it clear last week that they would wish to call Mr. Simels as a witness, and that precipitated a declaration of a mistrial as to those defendants.

Our main focus this morning is really on the question of Brooks Davis and his attorney, Mr. Simels. We have explored various possibilities of how to continue the trial and have Mr. Simels remain in the trial. Mr. Simels recognizes that he cannot be both a witness and an attorney in the same trial, and he is willing and his client is willing to consider ways in which they can defend the accusations against them without having Mr. Simels testify.

One possibility that has been suggested is to have Harper simply say "a legal respresentative" or "a lawyer", without identifying Simels. This in my view is wholly artificial. I think it would totally mystify the jury. Probably the jury would quickly divine that it was Mr. Simels, and they would probably divine it very quickly because of the obvious attempt to conceal who it was. So this artificial device is one which I will not countenance. It's really a fraud on the jury. Certainly, this kind of anonymous

treatment of lawyers and others has been engaged in in other trials, but never, in my experience, in a situation as serious as this.

Another suggestion is that there be no direct rebuttal testimony regarding the conversation between Simels and Harper, and that indeed, that there would not be any cross examination of Harper on this issue, and that the only defense would be the testimony of Mr. Gavenchak who would simply testify that he came in, showed Harper the affidavit, who appeared to understand it, and then signed it.

The problem here is that Brooks Davis would be forgoing the presentation of the most directly relevant evidence on the point, that is, Simels's testimony contradicting Harper's version of the meeting. The device I am talking about would involve Brooks Davis forgoing such testimony.

Incidentally, I am not in a position to ultimately resolve the questions of credibility between Harper and Simels as to that meeting, but I do know from the record that Simels has taken the stand and given sworn testimony contradicting Harper, and that would indicate to me that there is such testimony to be presented to the jury, and it would, of course, be of great assistance to Brooks Davis if it were true; and one would normally expect that issue to be presented to the jury by way of such testimony.

The device of relying solely on the Gavenchak testimony would mean that Mr. Simels would forgo cross-examining Harper about this meeting. That is something which a lawyer would normally do, but Mr. Simels would not be able to do it because of what has been discussed in the case law, that is, the problem of a lawyer in fact testifying through cross examination and summation even though he is not nominally a witness.

Finally, Mr. Simels would not be able to, in his summation, argue directly on the point of this conversation: and again, this is something which Mr. Brooks Davis would normally be entitled to have a lawyer do.

We are still talking about the problems of the proposal to rely solely on the Gavenchak testimony without direct rebuttal testimony by Simels, cross examination about the Simels-Harper meeting, and even the relevant summation on the point.

But in any event, even if we conceived of the possibility of relying on the Gavenchak testimony as the sole defense, it is impossible to keep the issue away from the jury, that is, did Simels commit misconduct at the behest of his client in going to Harper or didn't he?

It would be impossible to keep that issue away from the jury, and it would be before the jury even if it was a matter of arguing on the basis of the Gavenchak testimony. Inevitably, in representing Brooks Davis it would have to be argued that the conduct of Simels was proper in obtaining the affidavit. That is what the Gavenchak testimony is meant to signify; and if Brooks Davis's lawyer could not argue about what that testimony signified, then the testimony would be pointless.

So we are inevitably back to the basic question which we cannot avoid, and that is the issue as presented to the jury as to whether Harper's testimony is correct, and indicating misconduct on the part of Simels, serious misconduct, and obstruction of justice, or whether Mr. Simels is innocent of such conduct. That issue is presented, it's in the case, and cannot be avoided.

In my view, it is entirely artificial and hopelessly strained to be attempting to continue this trial with Mr. Simels acting as the defense lawyer for Brooks Davis. The various proposals involve attempts to suppress normal evidence, normal devices of defense, and to restrict the defense in such a way as to allow Mr. Simels to continue. The result of trying to do this to me is unworkable. If we were able to do it, it would deprive Brooks Davis of substantial rights. It would taint the trial with an artificiality and a distortion which to me is unseemly and is not proper administration of justice.

The only way to proceed in a clean, clear way, where the facts can come out and the parties can present the evidence in a

uninhibited proper way, is to have Mr. Simels disqualified from the case. Then the government can present its evidence freely and fully, Brooks Davis can present his defense to that evidence freely and fully and without inhibition and artificial limitations, and the other defendants can present their defenses in the same manner, and the only way this can happen is to have Mr. Simels disqualified from further activity in the case.

This brings us to the question of whether we can do this by way of an adjournment in the case to allow Brooks Davis to get another attorney or whether there should be a mistrial. I believe it is really totally vain to think that we could have a mere adjournment and a continuation of the trial. There are a number of difficulties with this. I think that the situation would present hopeless confusion and difficulty in the minds of the jurors to have Mr. Simels act at the beginning of the trial in his vigorous and lead role as defense counsel, and suddenly to have him depart and come back as an accused party and as a witness. How they would judge his credibility as a witness without considering his conduct as an attorney I cannot imagine.

Another thing, we are going to have to have another trial as to Wayne Davis and Claddis Arrington, and in my view, the appropriate way to continue this case is to start again with a trial of all four defendants on the issues, the issues not only about the alleged drug conspiracy but the issues about the plots to kill and otherwise silence witnesses. Those issues are very closely entwined for all defendants.

I think that the issues about the plot to kill and silence witnesses, those issues are almost even more closely related as to all defendants than perhaps even the drug conspiracy issues; and as long as we are having to make these drastic adjustments, the only sensible way is to declare a mistrial and start over.

It is a very regrettable development. It is a development which should not have occurred, but the indications are that Brooks Davis and his attorney, Mr. Simels, are the causes of the problem, and the consequences have to be suffered, unfortunately.

Even if it turns out that the jury finds that there was no misconduct in the sense of a plan or activity by Brooks Davis to get a false affidavit or threat by Mr. Simels, even if it turns out that the jury does not find that that happened, still, the problem has been created by Mr. Simels' going alone to the MCC to see Harper and sending this other lawyer alone to see Harper, and that is the cause of where we are now.

I am consequently declaring a mistrial as to Brooks Davis. I am ordering that Mr. Simels be disqualified from further representation of Brooks Davis.

As far as Mary Davis, there really is no possibility that the trial of Mary Davis can go on in the absence of the other defendants. The question of her guilt or innocence is intimately tied to the questions about her husband and even about the other defendants, and I am compelled to declare a mistrial as to Mary Davis, and this I do with even more reluctance than declaring the mistrial as to the others.

MR. RUBINSTEIN: I hate to interrupt your Honor. I have sat here and haven't said anything. I don't mean to interrupt you, but I haven't been addressed during this proceeding, nothing has been directed towards me, or no questions asked or to Mary Davis's position.

THE COURT: Mr. Rubinstein, I want to hear from you, but I want to also say that you have been present, and you have had a lot of participation.

MR. RUBINSTEIN: I mean this morning I am talking about, Judge.

THE COURT: You have had a lot of participation.

MR. RUBINSTEIN: I have a number of thoughts I wanted to —

THE COURT: I am at the point of making a necessary decision, and I see it no other way, and over hours and days I have

heard a great deal of your position. You have conferred constantly with Mr. Simels. You have been really virtually a team, to my observation, and I really see no way to avoid a mistrial as to Mary Davis. Do you?

MR. RUBINSTEIN: Yes, I do, your Honor. I see problems, frankly, your Honor. I didn't know that your Honor, when we entered this morning, was prepared to make a ruling this morning, frankly, and as your Honor has aptly said, and I take it as a compliment that Mr. Simels and I have worked as a team on certain of the issues. He and I have spent many hours over this weekend discussing this particular problem, and I join in his final letter of May 1st.

I think before your Honor makes this extraordinary ruling either as to Brooks Davis or as to Mary Davis, that we should have a full-blown hearing here. You have to appreciate, Judge, that what happened between April 11 and April 12 was a spontaneous reaction to a situation on behalf, by Mr. Simels and myself, and precipitated by what the government brought forward on the 11th as to the shooting of Diggins, the –

THE COURT: I have gone – really the action as far as Mary Davis is my own motion. But I want to hear from the government. What is your view about Mary Davis?

MR. McCARTHY: We agree with the court's view for precisely the reasons stated, namely, that that will not obviate the problem of Mr. Simels before this jury, having imbued himself in the manner that he has as far as these proceedings are concerned.

MR. RUBINSTEIN: Because of these extraordinary circumstances that happened within a 24 hour period, and when we arrived back in Mr. Simels' office, and I think I put this on the record last week, that Brooks Davis' call must have been between 7:30 and a quarter to 8. Mr. Simels' office is in midtown Manhattan. After Brooks Davis called, suggested that he had seen Harper, he was willing to talk to Mr. Simels, he and I agreed to go down that evening –

THE COURT: I'll tell you, there is one thing we have covered, and we have covered it over a period of many days. We have covered to the extent I feel we have to cover the events.

If you can suggest a way to continue this trial as to Mary Davis alone, I would be happy to hear that. I can't think of that.

MR. RUBINSTEIN: I, number one, feel that there should be a full hearing as to Harper because frankly –

THE COURT: That goes back –

MR. RUBINSTEIN: I don't see whether there was any threats even based upon what Harper says or that he perceived them as threats, whether he conducted himself in any manner because arguendo, what he says Mr. Simels said to him –

THE COURT: You are really arguing what we went over.

MR. RUBINSTEIN: There is a 6th Amendment right here, Judge. I think the waivable part –

THE COURT: There is no suggestion that you be disqualified from representing Mary Davis.

MR. RUBINSTEIN: I understand that, but the waivable part you suggest that Brooks Davis and Mary Davis cannot waive because it is so crucial to this case, I tell you as an advocate, I don't know, if I was representing Brooks Davis, after Harper's examination, whether I would want to call Simels or anybody else to the stand because it is such a tangential point as far as the focus of the case where Harper doesn't say that Brooks Davis had anything to do with this incident.

If I was on trial with Brooks Davis and Mary Davis alone, I don't think that I would be looking necessarily – oh, it might be beneficial, it might be a piece of evidence that might be considered, but I don't make it the kind of evidence that is so crucial –

THE COURT: I didn't make myself clear. I think that is entirely possible, but that isn't my point. The point is that on the drug charges, to go ahead and try – in other words, my premise is that I have to declare a mistrial as to Brooks Davis.

The idea of continuing and having the remainder of the trial involving the drug charges, have that go on as to Mary Davis without the resolution of the issues as to Brooks Davis, in other words, Mary Davis tried alone is just something I cannot conceive of.

MR. RUBINSTEIN: I take exception to that, Judge. Here is a lady that is remanded. She has been – at this point I think she was mentioned four times, if I'm correct, in passing. No witness has identified her either as to any kind of illegal or criminal activity.

Each trial, of course, is a separate trial, and in fact certain evidence on the conspiracy count would be brought in referring to other witnesses. We understand that. But as to her involvement in this case, she is on trial alone as far as we're concerned. Nothing has been suggested that she was involved in any way, either in the Diggins incident or in the Harper statement, and therefore, she should be permitted to go forward, and I seriously doubt, your Honor, that your Honor's ruling as to whether or not that particular evidence, which is not part of the conspiracy charge in this indictment, happened after the conspiracy was over, where she did not participate in any way whatsoever, and there is not a scintilla of evidence, whether or not any of that kind of evidence is going to be admissible at this trial against Mary Davis alone.

And if she was on trial with the other defendant, I would have asked your Honor for a ruling, a curative ruling that the jury understand that they couldn't consider this testimony in any way or manner as to Mary Davis. So why should we have to worry about that kind of testimony – we should probably even be entitled to a severance if there was a subsequent joint trial, and here we have the equivalent of a severance, and I think

that is fair because this kind of evidence that's going to be proffered against Wayne Davis and Arrington is very significant evidence against those two actors, but it is not any evidence at all as to Mary Davis, and –

THE COURT: The trouble is, I see no possibility of the jury deciding about Mary Davis without deciding about Brooks Davis. If Brooks Davis was not being charged and tried for drug conspiracy, she wouldn't be tried. Certainly the issues are separate as to her in a sense, but they are very, very closely entwined.

I would like to hear, what is your further proof about Mary Davis?

MR. McCARTHY: Your Honor, let me just say further, based upon what I have heard and what we now know. First of all, this whole sequence of what happened to Diggins and all the things that have happened on it are acts which are in furtherance of this conspiracy, which Mary Davis, the government will prove, is a member of.

THE COURT: You mean the plot to kill?

MR. McCARTHY: Absolutely.

THE COURT: That is what your proffer was when we had the bail hearing.

MR. McCARTHY: There is no doubt in our view that this evidence is absolutely admissible against any member of this conspiracy. Moreover, the fact that, as we now hear, Mr. Rubinstein was purportedly the person who was to be Mr. Simels' witness in the interview of Harper in the MCC is interesting for two reasons:

First of all, the fact that the representative of Mary Davis would be interested enough to go into the MCC for this purpose is telling in its own right. Moreover, if you think –

MR. SIMELS: I have never heard a more absurd comment in all the years I have been practicing.

THE COURT: I would take it easy on that kind of accusation.

MR. McCARTHY: Leaving that nonsense aside, it's even more interesting because ultimately somebody would have to have been called to be the witness for the defense as to that transaction, and had Mr. Rubinstein been the witness, we would have the same problem over again of one of the defense counsel in this case having to appear as a witness.

THE COURT: That is not getting us very far. I think I am prepared to declare the mistrial as to both defendants. I'm not disqualifying Mr. Rubinstein. I would like to call the jury in and dismiss them.

Would you go out, please.

(In open court; jury present)

THE COURT: Ladies and gentlemen, the problems that I very briefly alluded to last week that caused the separation of Wayne Davis and Claddis Arrington from the case, those problems are of broader significance than I realized, and after enormous amount of thought I have had to decide to terminate this trial, and do what in legal language is to declare a mistrial.

This is the most regrettable circumstance as far as I'm concerned that can be imagined. There has been a lot of work on the part of the court, on the part of all of you jurors and alternates, and on the part of the lawyers. The witnesses who have come and testified at great length, been cross-examined at length, and to have to abort this trial is to me a calamity, but there is no other way.

The case will have to be tried again. We will have to start again, and that is most unfortunate.

You are all citizens and you are intelligent people and the circumstances that lead up to this are on ***

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirty-first day of March, one thousand nine hundred and eighty-nine.

UNITED STATES OF AMERICA,

Appellee

-v-

CHARLES WILLIMAS, ET AL.,

Defendants,

CLADDIS ARRINGTON, BROOKS GREGORY DAVIS, MARY FERGUSON DAVIS, and WAYNE DAVIS,

Defendants-Appellants.

DOCKET NUMBER 88-1351, -1353, -1378, -1394

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellants Brooks Gregory Davis and Mary Ferguson Davis.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk
by ***